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ATINER is a ***World Non-Profit Association*** of Academics and Researchers based in Athens. ATINER is an independent **Association** with a **Mission** to become a forum where Academics and Researchers from all over the world can meet in Athens, exchange ideas on their research and discuss future developments in their disciplines, **as well as engage with professionals from other fields**. Athens was chosen because of its long history of academic gatherings, which go back thousands of years to *Plato's Academy* and *Aristotle's Lyceum.* Both these historic places are within walking distance from ATINER's downtown offices. Since antiquity, Athens was an open city. In the words of Pericles, **Athens*"…is open to the world, we never expel a foreigner from learning or seeing"*.** ("Pericles' Funeral Oration", in Thucydides, *The History of the Peloponnesian War).* It is ATINER's **mission** to revive the glory of Ancient Athens by inviting the World Academic Community to the city, to learn from each other in an environment of freedom and respect for other people's opinions and beliefs. After all, the free expression of one's opinion formed the basis for the development of democracy, and Athens was its cradle. As it turned out, the Golden Age of Athens was in fact, the Golden Age of the Western Civilization. *Education* and *(Re)searching* for the 'truth' are the pillars of any free (democratic) society. This is the reason why *Education* and *Research* are the two core words in ATINER's name.

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Before you submit, please make sure your paper meets some basic academic standards, which include proper English. Some articles will be selected from the numerous papers that have been presented at the various annual international academic conferences organized by the different divisions and units of the Athens Institute for Education and Research.

The plethora of papers presented every year will enable the editorial board of each journal to select the best ones, and in so doing, to produce a quality academic journal. In addition to papers presented, ATINER encourages the independent submission of papers to be evaluated for publication.

The current issue of the Athens Journal of Law (AJL) is the third issue of the fifth volume (2019). The reader will notice some changes compared with the previous issues, which I hope is an improvement.

Gregory T. Papanikos, President
Athens Institute for Education and Research

Athens Institute for Education and Research

A World Association of Academics and Researchers

16th Annual International Conference on Law
15-18 July 2019, Athens, Greece

The Law Unit of ATINER, will hold its **16th Annual International Conference on Law, 15-18 July 2019, Athens Greece** sponsored by the Athens Journal of Law. The aim of the conference is to bring together academics and researchers from all areas of law and other related disciplines. You may participate as panel organizer, presenter of one paper, chair a session or observer. Please submit a proposal using the form available (https://www.atiner.gr/2019/FORM-LAW.doc).

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- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.

Important Dates

- Abstract Submission: **3 June 2019**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **17 June 2019**

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Conference fees vary from 400€ to 2000€
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4-7 May 2020, Athens, Greece

The Business, Economics and Law Division (BLRD) of ATINER is organizing its 7th **Annual International Conference on Business, Law & Economics, 4-7 May 2020, Athens, Greece,** sponsored by the Athens Journal of Business & Economics and the Athens Journal of Law. In the past, the six units of BLRD have organized more than 45 annual international conferences on accounting, finance, management, marketing, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. Please submit an abstract (email only) to: atiner@atiner.gr, using the abstract submission form (https://www.atiner.gr/2020/FORM-BLE.doc)

Important Dates

- Abstract Submission: **1 October 2019**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **6 April 2020**

Academic Member Responsible for the Conference

- **Dr. Gregory T. Papanikos**, President, ATINER.
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Political Reporting: Its Regulatory Framework and Imperatives on Democracy and Democratisation of Communication in Nigeria

By Charles Obot[*]

Political reporting offers the citizenry the opportunity to be informed of current issues in the political sphere. It provides the link between the politician/government and the electorate. Much of what the citizenry knows about government activity or the politician is made possible by political reporting. Since democracy finds its essence in the electorate making informed choices, political reporting therefore becomes indispensable in modern democracies. Since political reporting cannot be done in a vacuum, certain principles have to be adhered to/ taken into consideration. These include: the political environment, regulatory framework, equal opportunity, fairness and democratisation of communication. Moreover, the political reporter is expected to demonstrate a high level of social responsibility and professionalism.

Keywords: *Political Reporting; Regulatory Framework; Democracy and Democratisation of Communication*

Introduction

Political reporting offers the citizenry the opportunity to be informed of current issues in the political sphere. It provides the link between the politician/ government and the electorate. Much of what the citizenry knows about government activity or the politician is made possible by political reporting. Since democracy finds its essence in the electorate making informed choices, political reporting therefore becomes indispensable in modern democracies.

This paper would be discussed under the following sub-headings:

i. Keywords: Political reporting and government broadcast media.
ii. Theoretical framework: Democratic-participant media theory.
iii. Politics: The origin of government's interest in the broadcast media in Nigeria.
iv. Regulatory framework of political reporting and advertisements in Nigeria.
v. The imperatives of political reporting in the government broadcast media.

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Theoretical Framework

The Democratic-participant media theory serves as the theoretical framework of this paper. According to McQuail[1], "the central point of a democratic participant theory lies with the needs, interests and aspirations of the active 'receiver' in a political society. It has to do with the right to relevant information, the right to answer back, the right to use the means of communication for interaction in small-scale settings of community, interest group, sub-culture". According to him, the principles of the theory are summarised as follows:

- Individual citizens and minority groups have rights of access to media (rights to communicate) and rights to be served by media according to their own determination of needs.
- The organisation and content of media should not be subject to centralised political or State bureaucratic control.
- Media should exist primarily for their audiences and not for media organisations, professionals or the clients of media.
- Groups, organisations and local communities should have their own media.
- Small scale, interactive and participative media forms are better than large-scale, one-way, professionalised media.
- Certain social needs relating to mass media are not adequately expressed through individual consumer demands, nor through the State and its major institutions.
- Communication is too important to be left to professionals.

Politics: The Origin of Government's Interest in the Broadcast Media in Nigeria

Government interest in the mass media dates back to the pre-independence era. Lasode traces the emergence of television broadcasting in Nigeria to an incident in the House of Representatives in 1953.[2] Eager for independence; Chief Anthony Enahoro – an Action Group member of the House moved the motion for self-government for Nigeria. The motion was opposed by members from the Northern Peoples Congress who constituted half the membership. Angered by this, the Action Group members led by Chief Obafemi Awolowo declared the Macpherson Constitution inoperative and walked out of the Assembly. The Action Group Ministers immediately resigned from the Federal Cabinet and this led to a Constitutional crisis. Disappointed by the decision of the Action Group Ministers, the Chief Secretary to the Nigerian Government – Mr. A. E. T. Benson telephoned Governor Macpherson urging him to make a

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[1]McQuail (1987) at 120-121.
[2]Lasode (1994) at 17.

broadcast on Nigerian Broadcasting Service (NBS) to the country about what was termed "perfidy of the Action Group". The Governor reluctantly made the broadcast. The following morning, Chief Awolowo telephoned the Director of NBS requesting equal time. Director Chalmer was quite ready to let Chief Awolowo refute what he claimed was a misrepresentation of the Action Group's point of view. However, the Secretary to Nigerian Government, Mr. Benson prevented Chief Awolowo from making his broadcast. Chief Awolowo was furious and accused NBS of being a tool manipulated by the government. This and other disenchantment with the inability of NBS to accomplish diversity in dealing with Regional interests led to the establishment of Western Nigerian Television in 1959 by Chief Obafemi Awolowo, followed by a radio service – Western Nigerian Broadcasting Service (WNBS) in May 1960. The Eastern Region established the ENTV on October 1, 1960, while the Northern Region established a radio and television service – the Radio Kaduna Television (RKTV) in 1962.

There was a general belief in the need for a Federal Broadcasting Corporation, independent of government that would serve the needs of everyone in the country no matter his or her political or tribal persuasion. The Nigerian Broadcasting Service was severely attacked by the Nigerian Press and the public for being a government tool. The nation wanted the NBS to be impartial and to reflect divergent views and the cultural set up of the nation. On April 1, 1957 the Nigerian Broadcasting Service (NBS) by an Act of Parliament was converted into a statutory corporation to be thenceforth known as Nigerian Broadcasting Corporation (NBC). The reason was to shield it from government interference and propagation of the views of the ruling political party. The NBC was then created to allay public fears of government monopoly of broadcasting. It became public property.

As recalled by Mackay[3], the Federal Government's admiration for a completely independent broadcasting corporation was short-lived, for in August 1961, the Federal Minister of Information – Honourable T. O. S. Benson sought leave to:

> *[…] amend the Nigerian Broadcasting ordinance to enable the Minister responsible for broadcasting to give general and specific directives to the corporation on matters appearing to the Minister to be of public interest and also enable him, after consultation with the appropriate Regional Government in the case of regional boards, to make recommendations to the Governor-General in Council as to the appointment of all members of the Corporation.*

The original ordinance carefully avoided giving the Federal Government or the Minister any powers to give directives to the corporation. The Corporation was also given the right to say that a particular item was inserted in its programme at the request of the government. But under the 1961

[3]Mackay (1964) at 66.

Amendment Act, the government or Minister of Information had the right to give specific or general directives to the corporation. This attracted some criticism.

Mackay[4] noted that 'Aiyekoto' – a pseudonym used by Bisi Onabanjo headed his attack of the amendment in the *Daily Express* with these words: "Now Radio Nigeria becomes Radio Benson". Mackay[5] also reports that John West – a pseudonym adopted by the eminent journalist – Lateef Jakande headed his criticism in *The Service* thus: "Mr. Benson Takes a Wife" and expressed fears that NBC would cease "to be either impartial or objective, or independent". John West suggested that the Minister should "find out how many listeners his Corporation has lost to WNBS". John West also remarked that the Federal Minister of Information "can compel the NBC to broadcast propaganda. He cannot compel the public to listen to it […]".

Nwuneli also quotes 'Aiyekoto' thus:

> *[…] every Nigerian tunes to the NBC when it is time for news, because he believes he is going to get unbiased news. In fact, I do not mind telling my NBC friends that the only useful programme they have is their news programme. It has a prestige now because it is believed that it is outside government control. Now that it is going under this control, the NBC may as well fold up.*[6]

From the above comments, it is apparent that before the amendment, the NBC news programme was considered credible and it enjoyed massive listenership.

This is the idea behind public service broadcasting. The 2000 Report of the World Radio and Television Council, Public Broadcasting: Why? How? describes the principles of independent public service broadcasting as being universality, diversity, independence and distinctiveness, and explains them as follows:

- It is accessible to every citizen, not merely in technological terms, but also in terms of the intelligibility of the programming.
- It demonstrates diversity in the genres of programmes offered, the audiences targeted and the subjects discussed.
- It is independent of commercial pressures and political influence. This includes editorial independence, protections for freedom of expression, adequate, predictable and independent mechanisms of financial autonomy and the independence of governing bodies and the disolution process for their boards and chief executives.
- It not only produces types of programmes and subject matter other services ignore and targets audiences others neglect but, without excluding any genre, it aims to innovate, create new genres, and set the pace in the audiovisual world.

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[4]Mackay (1964) at 69.
[5]Mackay (1964) at 70.
[6]Nwuneli (1985) at 209.

The mandate of the public service broadcaster may include a range of duties and responsibilities designed to serve the public service, such as:

- Provide comprehensive, balanced and impartial news and current affairs programmes, including national and international affairs of general public interest.
- Provide programming of wide appeal as well as specialised programming.
- Contribute to national identity while also reflecting cultural and regional diversity.
- Give a voice to minority groups, including minority languages.
- Provide a reasonable proportion of educational programmes.
- Provide a reasonable proportion of programmes for children, and
- Promote programme-making by in-country producers, including regional production.

Regulatory Framework of Political Reporting in Nigeria

There are some regulatory provisions governing political reporting and advertisements in the Nigerian mass media. These include the Nigeria Broadcasting Code (NBC), Electoral Act 2010 and the Advertising Practitioners Council of Nigeria (APCON) Code. Relevant sections of these Codes are presented below:

Political Objectives of Broadcasting in Nigeria (NBC Code 0.3.2.4)

To contribute to the development of national unity and participatory democracy. Therefore, broadcasting shall:

a. create and promote political awareness amongst the people in order to achieve a democratic society;
b. inculcate in the people the spirit of tolerance of all shades of opinion;
c. promote social justice based on the responsibilities and rights of the individuals in society.

  - News material shall not be recreated.
  - News, commentaries, analyses and editorials shall be clearly identified as such.
  - Commercials in News and Current Affairs programmes shall be clearly identified and presented in a manner that shall make them clearly distinguishable.
  - The promotion of an organisation, product or a service of commercial interest shall not be treated as news analysis, commentary or editorial.
  - The use of terminologies such as “analysts”, “observers”, etc., shall not be accepted as attribution in a news report.

- Pane lists shall be of comparable status and relevance.

Political Broadcasts (NBC Code 5.2)

- Political programmes shall observe the provisions of the Code, and other extant laws relating to broadcasting.
- All political broadcasts shall be the product of the broadcaster except advertisements, promos and collaborative productions supervised by relevant organisations like BON, INEC, NOA, etc.
- All broadcasters shall carry out their civic responsibility of transmitting all aspects of political enlightenment.
- Partisan political broadcasts shall be only those in which the Parties seek to explain their views and policies.
- Political broadcasts shall be in decent language.
- Political broadcast broadcasts shall be clearly identified as such, and shall not be presented in a manner that would mislead the audience to believe that the programmes are of any other character.
- A broadcaster shall, in using political material for news, avoid taking inflammatory and divisive matter in its provocative form.
- In adherence to the principles of pluralism, equal airtime shall be provided to all political parties or views, with particular regard to the amount of time and belt, during political campaign period.
- All broadcasters shall regularly broadcast announcements to the effect that every political party is entitled to air time during political campaign periods.
- At campaign periods, log books shall be kept by each broadcaster at a level not below the level of a “Controller” or its equivalent, showing the allocation of news, programmes and commercial air-time to each Party with dates, title and other information as may be requested by the Commission to ensure fairness.
- All partisan political broadcasts shall be recorded at transmission point and preserved for at least 90 days after first broadcast.
- All partisan political broadcasts, campaigns, jingles, announcements and the use of all forms of partisan political party identifications or symbols on air shall end not later than twenty-four hours before polling day.
- In exceptional circumstances, an office holder may, within the 24 hour period, perform a service relating to his office, provided there is no display of partnership.
- A broadcaster shall not use any vote obtained at different polling stations or from exit polls, or project or speculate on the chances of the candidates.

- A broadcaster shall broadcast electronic results or declaration of the winner only as announced by the authorised electoral officer for the election.
- In the interest of fairness and balance, any form of commercialisation of political news is not allowed.
- No political jingle shall exceed 60 seconds.
- While a broadcast producer may interact with politicians in the course of his professional duties, this shall not be such, as to lead to the belief, that he is either a member or sympathiser of any political party.
- A broadcaster shall avoid adulation and the tendency to glamorise persons or resort to praise singing or denial of access to those of contrary views or political leanings to such persons.
- In programmes requiring the representation of political parties or affiliations, the pane lists shall be of comparable status and relevance.
- No pane list shall use Party logo, insignia, etc. to the disadvantage of other pane lists.
- A broadcaster shall set up a standing Electoral Complaints Committee to resolve all disputes within 24 hours of receipt of the complaint.
- The appropriate decisions, including the grant of a Right of Reply or Apology, shall be implemented within 24 hours, and at the same level of prominence.
- The Committee's proceedings shall be forwarded to the Commission not later than 48 hours.

Political Advertising (NBC Code 7.6)

- A political advertisement shall be guided by the extant laws(s), the Code and other relevant regulations.
- A broadcaster shall be free to sell airtime for the purpose of political campaigns provided that:
- All messages shall be in the form of spot announcements or jingles not exceeding 60 seconds;
- No broadcaster shall be involved in the production of such announcements or jingles;
- No voice of any on-air staff of any broadcast station shall be used in political jingles;
- All jingles shall conform to the standards of truth, decency, good taste and morality.
- No advertisement shall be accepted in a partisan political programme.
- The advertiser shall be clearly identified in all advertisements.
- No broadcaster shall deny any person, party or group a right of broadcast of a political advertisement.

- The period of campaign through any broadcast media in any election by every political party shall commence 90 days before polling day and end 24 hours prior to that day.
- No broadcaster shall permit any political campaign or advertisement on its facilities 24 hours immediately preceding polling day or on polling day.
- All broadcasters shall give equal access to all registered political parties or candidates on their facilities.
- Airtime shall be allocated equally among the political parties at similar hours of the day.
- All broadcast stations shall allot equal airtime to all political parties during prime times and at similar hours each day, subject to the payment of appropriate fees.
- All broadcasting stations shall ensure equal coverage to all political parties.
- No broadcasting station shall be employed or used to the advantage or disadvantage of any political party or candidate at any election.
- It shall be the duty of the broadcaster to authenticate purported withdrawal of a candidate in an election and ensure that the affected candidate personally endorses such claim.
- Any broadcast station that contravenes the provisions of Sections 7.6.6 to 7.6.13 above, shall be liable, in the first instance to a fine of N500,000 and N1,000,000 for subsequent breach(es) suspension or revocation of licence.

Electoral Act, 2010, Section 95, Sub-sections 1 – 3, Section 100, Sub-sections 1 – 6, Section 102

1. A political campaign or slogan shall not be tainted with abusive language directly or indirectly likely to injure religious, ethnic, tribal or sectional feelings.
2. Abusive, intemperate, slanderous or base language or insinuations or innuendoes designed or likely to provoke violent reaction or emotions shall not be employed or used in political campaigns.
3. Places designated for religious worship, police station and public offices shall not be used:
   a. for political campaigns, rallies and processions; or
   b. to promote, propagate or attack political parties, candidates, their programmes or ideologies.
4. A candidate and his Party shall campaign for the elections in accordance with such rules and regulations as may be determined by the Commission.
5. State apparatus including the media shall not be employed to the advantage or disadvantage of any political party or candidate at any election.

6. Media time shall be allocated equally among the political parties or candidates at similar hours of the day.
7. At any public electronic media, equal airtime shall be allotted to all political parties or candidates during prime times at similar hours each day, subject to the payment of appropriate fees.
8. At any public print media, equal coverage and conspicuity shall be allotted to all political parties.
9. A public media that contravenes subsections (3) and (4) of this section commits an offence and is liable on conviction to a maximum fine of N500,000.000 in the first instance and to a maximum fine of N1,000,000 for subsequent conviction.
   a. A person, print or electronic medium that broadcasts, publishes, advertises or circulates any material for the purpose of promoting or opposing a particular political party or the election of a particular candidate over the radio, television, newspaper, magazine, handbill, or any print or electronic media whatsoever called during 24 hours immediately preceding or on polling day commits an offence under this Act,
   b. A candidate, person or association who engages in campaigning or broadcasting based on religious, tribal or sectional reason for the purpose of promoting or opposing a particular political party or the election of a particular candidate, commits an offence under this Act and is liable on conviction to a maximum fine of N1,000,000 or imprisonment for a term of 12 months or to both.

APCON Code on Political Advertising

The Code of advertising practice of the Advertising Practitioners Council of Nigeria (APCON) makes the following provisions for political advertising in Nigeria.

i. Truth: Political ads shall not be deceptive or misleading in word, photography, film or sound.
ii. False Claims: Political advertisements shall be issue-oriented and devoid of abusive statements or references.

Furthermore, they should not employ fake, distorted or unsubstantiated claims or misrepresentations.

iii. Advertiser's Identity: Every political advertisement must clearly identify the sponsoring organisation or individual, visually and orally. Anonymous sponsors like "Committee of friends" must be avoided.
iv. Sectional interest: Political advertisement shall not explicitly or implicitly exploit ethnicity, religion or any other sectional interest not strictly related to political issues under discussion.

v. Agency conduct: Agencies engaged in political advertising must not produce or use any material that is capable of bringing the advertising profession into disrepute.
vi. Equal opportunity: Political candidates must be given equal opportunity to buy space and/or air time. "Equal opportunity" means that each competing candidate must have equal access to comparable space and/or air time, generally on the basis of first come, first served.
vii. Compliance: Media houses, agencies, political parties, politicians and their agents must ensure that political advertisements are in consonance with the provisions of the Code. When in doubt, they should seek immediate clarification from APCON Secretariat.

Adherence to the APCON Code in political advertising in Nigeria is difficult to ascertain as information on enforcement by APCON is not widely publicised.

The Imperatives of Political Reporting: Equal Opportunity, Fairness, Democracy, Democratisation of Communication and Social Responsibility

Political reporting is the art of gathering, writing or presenting stories about politics, political activities or issues that border on government and governance. Government broadcast media are electronic organisation that depend on direct funding from and under direct control of the government of the day.

Political reporting in a government broadcast medium is a very challenging endeavour, and it often sets the political reporter on a collusion course with the government or political party in power. Whether in a government broadcast media, truly publicly owned or privately owned the imperatives of political reporting are similar.

Islam notes that:

> *the media industry, whether public or private, plays an important role in any economy by garnering support or opposition for those who govern, by highlighting or failing to do so the views and/or sins of industry, by providing a voice for the people or not doing so, and by simply spreading economic information.*[7]

The mass media not only carry information about the economy, but also messages about the social, political and religious lives of the people. In the opinion of Wolfensohn,

> a free press is not a luxury. It is at the core of equitable development. The *media can expose corruption. They can keep a check on public policy by throwing a spotlight on government action. They let people voice diverse*

[7]Islam (2002) at 3.

opinions on governance and reform, help build public consensus to bring about change.[8]

It can be deduced from Wofensohn's opinion that easy and equitable access to the mass media as well as diversity of views in media contents are not only indispensable, but are also crucial for the emergence of a democratic society and attainment of development. Unfortunately, many people have observed on many occasions that the mass media in Nigeria have not been the "market place of ideas" they are supposed to be. The principle of equal opportunity is central to coverage of electoral campaigns in a multi-party democracy.

According to Dominick[9], equal opportunity rule stipulates that if a station permits one candidate for a specific office to appear on the air, it must offer the same opportunity to all other candidates for that office. If a station gives a free minute to one candidate, all other legally qualified candidates for that office are also entitled to free a minute. Same goes for the cost of air time.

Wilson recalls that the United States Congress included the 'equal opportunity provision in the 1927 Federal Radio Commission (FRC) and 1934 Federal Communication Commission (FCC) Acts to protect candidates for political office.[10]

Nwodu defines electoral campaign as:

the overall deliberate, planned well-articulated and sustained message-oriented effort aimed at presenting a candidate for political office to the electorate with a view to attracting voters' sympathy and consequently, moving the electorate to vote massively for the candidate so presented.[11]

Democracy thrives on the principles of informed electorate making responsible choices and decisions. The mass media are not only key avenues for providing the required information; they also determine what is available in the public domain. This is a result of what Gurevitch and Blumber call three sources of media power. These are structural, psychological and normative. According them, the structural root of the power of the mass media "springs from their unique capacity to deliver to the politician an audience, which in size and composition, is unavailable to him by any other means".[12]

The psychological root of the media power stems from the relationships of credibility and trust that different media organisations have succeeded in developing (albeit to different degrees) with members of their audiences. Gurevitch and Blumber assert that:

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[8]Wolfensohn (2002) at v.
[9]Dominick (1990) at 441.
[10]Wilson (1993) at 78.
[11]Nwodu (2003) at 53.
[12]Gurevitch & Blumler (1977) at 274.

it is the combined influence of this structural and psychological source of strength that enable the media to interpose themselves between politicians and the audience and to 'intervene' in other political processes as well.[13]

This interposition, according to them, is expressed in the way in which the mass media are capable of restructuring the timing and character of political events (conventions, demonstrations, leader appearances, etc.), defining crisis situations to which politicians are obliged to react, requiring comment on issues that media personnel have emphasised as important, injecting new personalities into the political dialogue (such as television interviews) and stimulating the growth of new communication agencies (such as public relations firms, opinion poll agencies, and political advertising and campaign management specialists). On the other hand, the normative root of media power stems from the respect that is accorded in competitive democracies to such tenets of liberal philosophy as freedom of expression and the need for specialised organs to safeguard citizens against possible abuses of political authority.

Pate emphasises that political reporting is necessary for sustenance of democracy where the system of checks and balance is required for good governance.[14] In doing do, Wilson advises that such activity should be "ruled by fairness or equal opportunity, right of access and reply so that contending contrary positions can be heard."[15] To ensure equal opportunity in the coverage of electoral campaigns by public media in the country, the Electoral Act 2010, Section 100 makes the following provisions.

(i) A candidate and his party shall campaign for the election in accordance with such rules and regulations as may be determined by the commission.
(ii) State apparatus including the media shall not be employed to the advantage or disadvantage of any political party or candidate at any election.
(iii) Media time shall be allocated equally among the political parties at similar hours of the day.
(iv) At any public electronic media, equal coverage and conspicuity shall be allotted to all political parties.
(v) At any public print media, equal coverage and conspicuity shall be allotted to all political parties.
(vi) Any public media that contravenes sub-sections (3) and (4) of this section shall be guilty of an offence and on conviction be liable to a fine of ₦500,000 in the first instance and to a fine of ₦1,000,000 for subsequent conviction.

[13]Gurevitch & Blumler (1977) at 75.
[14]Pate (2003) at 129.
[15]Wilson (2003) at 121.

Emphasising the desirability of equal opportunity in electoral campaigns coverage, Sotunmbi suggests that Party functionaries should be invited to talk to the audience on the Party manifesto according to an agreed time-table. The duration of time allocated to each Party should be the same and care must be taken to ensure that the broadcasts are scheduled such that no political party is seen to have gained an undue advantage over the other.[16]

Chester, Garrison and Willis[17] recall the provision of Section 315 of FCC Act in part:

> *if any license shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed* upon any licensee to allow the use of its station by any such candidate.

This provision means that television and radio stations must offer free time or sell time on equal basis (including identical discounts) to all legally qualified candidates for the same office during a political primary or election campaign. Congress made some exceptions to this law. Wilson explains the exceptions thus: appearance by a legally qualified candidate on any (a) bona-fide newscast (b) Bona-fide news interview (c) Bona-fide news documentary (if the appearance is incidental to the presentation of the subject or subjects covered by the news documentary), or (d) on-the-spot coverage of bona-fide news events (including, but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this sub-section.[18]

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscast, news interview, news documentaries and on-the – spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The point that the public is entitled to hear a reasonable balanced presentation of all responsible viewpoints on particular issues came to be known as the Fairness Doctrine.

FCC made it clear that the doctrine did not require that equal time be provided for every view, nor was it necessary to permit a spokesman for every side to be heard. The station met the requirement of the doctrine if in its overall programming it provided a reasonable exposure to the various points of view on a controversial issue. However, the FCC did lay down some specific rules with respect to certain types of programmes. If honesty, integrity or character

[16]Sotunmbi (1999) at 216.
[17]Chester, Garrison and Willis (1971) at 137-138.
[18]Wilson (1993) at 78.

of a group or person were attacked in connection with the discussion of a controversial issue, the FCC required that the subject of the attack be notified of the date and time of the broadcast, be sent a tape, script or summary of the attack within seven days, and be afforded a reasonable opportunity to rely. If a station endorses political candidates, it was required to notify opponents within 24 hours and provide an opportunity for replies by other candidates or their spokesman. If the endorsement took place within 72 hours of the election, other candidates had to be notified prior to the broadcast.

Although the fairness doctrine was abolished in America in 1987[19], two corollaries to the Fairness Doctrine remain in effect: these are the personal attack and the political editorial rules. The personal attack rule requires that broadcast licensees provide time for individuals to respond to personal attacks made during discussions of controversial public issues. Broadcasters must provide political candidates the opportunity to respond to editorials attacking them or supporting their opponents. Stations must notify the person attacked, or the candidate, provide them with a script or tape of the programme where the attack or endorsement was made, and allow for a *reasonable opportunity* to respond without financial charge.

When the original Fairness Doctrine Rule was in force, broadcasters were required to seek out and present contrasting viewpoints on controversial matters of public importance. On any issue, broadcasters had to make a good faith effort to cover all the opposing viewpoints. This did not have to take place in one programme, but the broadcaster was expected to achieve the balance over time. Whatever happened to the *Fairness Doctrine* in America, emerging democracies like Nigeria need such regulation to build and stabilise that preferred system of government to be able to get to where the USA and UK have reached in governance.

Democracy, even in its fledging stage as obtained in Nigeria, should offer a participatory form of governance in which all the constituent-groups in a given society enjoy the rights to self-determination, equal representation at all levels of government, right to expression of views, equal opportunity to socio-economic and political advancement as well as equal right and access to leadership position at all levels.

Akpan notes that:

> *In a free and democratic society, the press as a whole is the market place of political thoughts. The broadcast media exist to serve the information needs of the citizenry. Editors, commentators, anchormen and newsmen as a whole work on the principle that the public is entitled to all the facts in political situation and that on the basis of those facts; it can make its own decisions.*[20]

Democracy presupposes that popular or mass participation by the citizenry in public affairs and access to public institutions is necessary for the sustenance

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[19]Dominick (1990) at 412.
[20]Akpan (1985) at 219.

of democracy. Anam states that "democracy and free media are symbiotic"[21]. He explains that democracy promotes freedom of expression, but free media further develop nascent democracies. Thus, while some democratisation was necessary to liberate the media, over time the media have become stronger, more vibrant and more of a voice for the people; promoting a more transparent democracy and a government that makes informed choices.

Stigliz emphasises that:

> *Essentially, meaningful participation in democratic processes requires informed participants. Secrecy reduces the information available to the citizenry, hobbling people's ability to participate meaningfully.*[22]

On the other hand, openness is one of the most important checks on the abuse of public fiduciary responsibilities. While such openness may not guarantee that wise decisions will always be made, it would be a major step forward in the on-going evolution of democratic processes, a true empowerment of individuals to participate meaningfully in the decisions concerning the collective actions which have profound effects on their lives and livelihoods. Besley, Burgess and Prat emphasise that "a free or non-captured media can affect political outcomes through three routes namely: sorting, discipline and policy salience"[23]. Sorting refers to the process by which politicians are selected to hold office. The kind of information media provide can be important to voters who are deciding who to put in charge. This includes information about candidates' previous tract records. Their actions while in office may also be an important source of information about their underlying motivation or competence. By publishing stories that responsibly cast light on this, the media can be a powerful force.

The role of the media in achieving discipline in most relevant in situations of hidden action. This involves exposure of activities which perpetrators do not want the public to know. The media can also affect which issues are salient to voters.

Onuoha emphasises that:

> *a democratic media can be identified by its structure and functions. In terms of structure, it would be organised and controlled by ordinary citizens or their grassroots organisations. This could be one or a few individuals or bodies serving local or larger political, minority or other groups in the social and political arena.*[24]

Herman asserts that media fitting these structural conditions would be bound to articulate demands of the general population because they are either part of it or instruments created to serve its needs. As regards functions, Herman [25] explains

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[21]Anam (2002) at 267.
[22]Stigliz (2002) at 30.
[23]Besley, Burgess and Prat (2002) at p. 49.
[24]Onuoha (1999) at 119.
[25]Herman (1994) at 40.

that a democratic media will aim first and foremost at serving the informational, cultural and communication needs of the members of the public which the media institutions comprise or represent. Moreover, a democratic media would recognise and encourage diversity. It would allow and encourage minorities to express their views and build their own communities' solidarity within the large community. This would follow from the democratic idea of recognising and encouraging individual differences and letting all such flowers bloom irrespective of financial capacity and institutional power.

Sotunmbi suggests that:

> *To popularise and sustain democracy, radio and television organisations would have to air more than one point of view on controversial political issues, educate the audience on their political and constitutional rights, provide for an objective debate of policy issues, promote accountability in public office and expose boardroom intrigues and improper business deals.*[26]

The Nigerian Broadcasting Code[27] envisages that broadcasting shall contribute to the development of national unity and participatory democracy. Therefore, the Code stipulates that the political objectives of broadcasting in Nigerian shall be to:

i. create and promote political awareness among the people to achieve a democratic society;
ii. inculcate in the people the spirit of tolerance of all shades of opinions, and
iii. promote social justice based on the responsibilities and rights of the individual in the society.

In the opinion of Oso[28] democracy will not take root in Nigeria unless the process and means of public communication is democratised. This means, the more diverse and richer the voices and ideas in the market place, the better for democracy in Nigeria.

Sotunmbi advises that the:

> *Broadcast media should promote the activities of pressure groups, especially professional associations, intellectuals, artistes and human right associations who tend to serve as the conscience of society. Indeed, the electronic media should promote freedom of expression and freedom of association and seek to enhance the protection of ordinary citizens and minority groups under the law*.[29]

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[26]Sotunmbi (1999) at 215.
[27]Nigerian Broadcasting Code , 2010 at 14-15.
[28]Oso (2003) at 18.
[29]Sotunmbi (1999) at 215.

Sotunmbi canvasses that broadcasters should have the freedom to determine the philosophy, content and mode of execution of their programmes without external pressure or interference.

In the above respect, Traber has this to say:

> *Democratisation of communication and democratisation of society are of course interdependent. They are variables of the same reality. To democratise communication therefore means to democratise society, and vice versa. But from our perspective of public philosophy, it is precisely the role of the media to be a catalyst in the democratic process.*[30]

Also, the Latin American media experts, reported by Traber, at a meeting in Embu, Brazil, in 1982 affirm that:

> *Democracy is above all a fundamental human attitude expressed in communication by abolishing authoritarian forms and relying on the conscious, organised and collective action of the oppressed. Pluralistic participation of social actors should manifest itself in the different levels of communication process, particularly in the production, distribution and assumption of cultural goods.*

Traber suggests a change in the 'social actors' criterion of news selection. By this, he means that the masses, instead of the elites, should become the focus when considering the 'who' of an event. He posits that: alternative criteria of news need to be established, practised and taught, and they are to a large extent a reversal of the news values of conventional journalism. What is needed first and foremost are alternative social actors, or the re-definition of the criterion of prominence.[31]

According to him, social actors are those groups of persons or persons who almost as a matter of right; are covered by the media and can speak through them. The very process of publicity makes them prominent, even those who otherwise might be totally insignificant in terms of their public service. To bring about a new definition of social actors in the 'new journalism', Traber suggests that:

> *If the media make a conscious effort to report on, and in fact give preferential treatment to the manual labourers and their agricultural and industrial organisations, to the women and their groups, to the youths and children, and to the forgotten minorities, these persons and groups do become social actors who can speak to the public at large and thus occupy a place in the public consciousness.*[32]

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[30]Traber (1987) at 66.
[31]Traber (1987) at 73.
[32]Traber (1987) at 66.

If Traber's suggestion is implemented, every citizen would become a potential news-maker, instead of the present situation whereby high social status serves as one of the major considerations to merit media coverage. This implies that mass media operators should be alive to their social responsibility. McQuail[33] highlights the main principles of social responsibility to include:

a. Media should accept and fulfil certain obligations to society.
b. These obligations are mainly to be met by setting high or professional standards of information, truth, accuracy, objectivity and balance.
c. In accepting and applying these obligations, media should be self-regulating within the framework of law and established institutions.
d. The media should avoid whatever might lead to crime, violence or civil disorder or give offence to minority groups.
e. The media as a whole should be pluralistic and reflect the diversity of their society, giving access to various points of view and right of reply.
f. Society and public, following the first named principle, have a right to expect high standards of performance and intervention can be justified to secure the, or a, public good.
g. Journalists and media professionals should be accountable to society as well as to employers and the market.

Social responsibility as a mass media principle acknowledges the existence of various ethnic, religious, political and cultural sensitivities of individuals and groups. Expanding and guaranteeing freedom of speech thus require consideration for the right of individuals to access in broadcasting, which in turn requires more diversity, a broader spectrum of opinions and points of view, and a reversal of current policies that restrict access to establishment spokespersons. Kellner[34] posits that a democratic broadcasting philosophy would hold that broadcasting in a democratic society should help make possible an informed citizenry by airing controversial issues of public importance from a variety of positions. It should facilitate access to citizens and public interest groups and the public interest should be determined by the extent to which broadcasting promotes a robust democracy and helps produce a democratic public sphere.

Conclusion

Political reporting can be said to be the catalyst for democracy and good governance. It cannot be effective if it does not guarantee equal opportunity; fairness and engender democratisation of communication. Therefore, the political reporter must exhibit a high sense of social responsibility in the performance of his duties.

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[33]McQuail (1987) at 11.
[34]Kellner (1990) at 185,

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The Unpopularity of Property Law Modules: Popular Culture offers Solutions

By Anna Chronopoulou[*]

The commodification of Legal Education and the popularity of law as a subject of study have been reflected in a plethora of law courses at undergraduate and postgraduate levels on offer in the English Universities. Property Law modules do not necessarily enjoy the same degree of popularity to other modules on a qualifying law degree in English Universities. Despite being slowly changing modules, Property Law modules did not remain unaffected by the commodification of legal education. As a result, Property Law became highly specialised. This quickly translated in optional modules such as: Succession Law, Housing Law, Landlord and Tenant Law, Construction Law etc. Nevertheless, Property Law modules remain highly unpopular among the student population in the English Universities. This paper examines the reasons for this by focusing on three parameters. The first parameter examines the nature of the subject itself as highly technical, therefore less adventurous and attractive. The second parameter brings forward the suggestion that neither legal educators nor researchers have actually successfully managed to break away from the monotony of Property Law subjects. The third parameter proposes solutions to the increasing unpopularity of these subjects. It puts forward the suggestion that a socio-legal approach to the subjects combined with appealing forms of popular culture might just increase the popularity of the subjects among the student population.

Keywords: *Legal Education, Property Law modules, Popular Culture*

Introduction

Legal education has experienced a number of transformations in England and Wales over the last decades. The transformation from classical to ascribed criteria demarcated the renegotiation of the classical knowledge mandate. The increased specialisation of areas of legal practice led to the commodification of legal education with a wide range of legal subjects on offer at undergraduate and postgraduate level[1]. This was sustained through an unprecedented popularity of law as a subject of study. As a result, this influenced the growing number of law students from wider sections of society and possessing different social characteristics in terms of gender, class, race and age entering law schools in English Universities[2].

The increasing demand of the study of law led to the production and consumption of a great number of law programmes, ranging from general legal

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[1]Collier (2005).

[2]Sommerlad (2007). The same claim is put forward in a number of articles, see by way of reference Sommerlad, Webley, Duff, Muzio & Tomlinson (2010).

studies to criminology and more recently Commercial law oriented programmes at all levels, in the English Universities. Although most of the aforementioned programmes have enjoyed a great degree of popularity, it would be naïve to suggest that Property Law oriented modules and programmes fall in this category. The commodification of legal education affected the slowly changing nature of Property Law modules in a number of ways. In reflecting specialisation, Property Law modules seemed to have suddenly surpassed the numerical limitations distinguishing between Property Law I, commonly referred to as: Land Law and Property II usually referred to Equity and Trusts. Individual areas of property law which in turn reflected areas of specialisation were quickly designed and redesigned as optional modules such as: Succession Law, Housing Law, Landlord and Tenant Law, Construction Law etc. Despite the incredibly sophisticated packaging, Property Law modules still remain highly unpopular among the student population in English Universities.

This paper examines the reasons for this by focusing on three parameters. The first parameter explores the highly technical nature of Property Law, which makes it less adventurous and appealing to students. The second parameter examines the attitude of legal educators and researchers towards Property Law subjects. The third proposes solutions to the increasing unpopularity of these subjects. It puts forward the suggestion that a socio-legal approach to the subjects combined with appealing forms of popular culture might just increase their popularity among the student population.

Property Law Subjects and their Nature

The nature of Property law subjects has not exactly been the easiest of tasks to deal with. They are considered to be slowly changing subjects, nevertheless, extremely substantive resembling almost the black letter approach to law, which enhances their unpopularity amongst the student population[3].

Traditionally, property law subjects comprise Land Law and Equity and Trusts both subjects are considered core modules for a qualifying law degree in England. Also traditionally, property law subjects have always been associated with solicitors' work commonly known as conveyancing[4]. From this perspective both subjects are closely associated not just with lawyers' work and what lawyers do but also they are inextricably linked to the history of the legal profession in England and Wales something that could not offer a justification for their unpopularity taking into consideration that every English Law School at the moment produces lawyers.

Property Law deals mainly with the registration of interests that govern land and the English soil therefore it is mainly concerned with legal interests. Equity and Trusts again a property law subject deals mainly with the regulation of equitable interests. Land law comprises endless legislative and case law provisions attaching a highly technical feel to the module. Equity and Trusts

[3]Hudson (2015).

[4]Abel (1988). See also Abel (1999) and Abel (2003).

the other component of the Property based modules, the core ones, does not exactly fall short behind. Apart from the difference in the nature of interests, however, Equity and Trusts is also heavily crammed with a great number of case law acquiring in this sense a highly technical feel to it. Both modules do possess a highly slowly changing nature in terms of case law and legislative intervention. The suggestion here is that the highly technical and slowly changing nature of the Property Law modules make them unpopular amongst the student population. The highly technical nature of the property law subjects disassociates them from the social, encouraging a form of a-sociality or even adiaphorisation and disinterest in regards to the modules making it even harder for the subjects to claim back their role and importance within the social context[5]. It is exactly this disassociation from the social that makes Property Law subjects less and less popular amongst law students.

Generally speaking, the commodification of legal education and of the provision of legal services has not left Property Law subjects and modules unaffected. More specifically, the commodification of property law subjects has seen itself in being broken down to a plethora of specialisation subjects of property law such as Housing Law, Landlord and Tenant, Construction Law[6]. In other words, every single area that used to have been offered by then as part of the Property modules due to specialisation has started being offered on its own. Nevertheless, the nature of those modules as well has followed the complicated nature of the core Property Law modules increasing from this perspective the unpopularity of the modules overall. The mould of these modules did not break away from the usual way that these modules have been offered and organised reinforcing in this sense the unpopularity of the modules amongst the student population. Across the board the subjects remain highly technical in nature as well as promoting a black letter, substantive approach rarely if ever being mixed with aspects of theoretical approaches.

To a great extent this is also an issue of the highly complicated substantive nature of the subjects due to the common law system itself based upon the lack of codification creating confusion in this sense[7]. Despite the repeated attempts of the legislator to make the subjects less complicated it seems that the introduction of recent Acts just for the regulation of interests has even complicated the subjects further. The attempts from the European legislation and regulation have not been necessarily implemented to the study and nature of Property Law modules. Despite the codification provided by the EU legislation this has not been implemented either properly or in parts at all. Retaining in this sense the sovereignty of not just English Property Law but of the land as well. The latest developments in the referendum after Brexit are highly likely to complicate things in Property Law Modules even more. The reason for this is that is that the simplification of codification applying in Civil Law Jurisdictions, through EU Law limited of course nevertheless existent will not be there anymore for Britain.

[5]Goodrich (1996). See also Goodrich (2000).
[6]Hudson (2015).
[7]Hudson (2015).

Although the situation with Brexit remains to be seen, despite this having influenced the property market this remains still outcast in the sphere of commercial awareness rather than an actuality of justifying the unpopularity of property law modules. For the time being, it looks like what Brexit has affected in the sphere of property market is the prices of commercial as well as residential properties whether for lettings or for sale. While the property market has been grind to a halt and Great Britain feels smaller than ever, funnily enough this has not managed to push up the popularity of the subjects. Needless to say that the battering the property market has taken after Brexit has even deteriorated the situation with the relevant modules popularity rendering them even more unpopular.

Apart from the recent developments as far as Brexit is concerned there has always been an undisputed factor as to the students' attitudes in regards to the liking of the modules of Property Law. It has to be said and submitted that these subjects have never enjoyed the popularity that the Criminal law options have enjoyed. The reason for this is not just the technical nature of the subjects because Criminal law is fairly technical itself. However, it is increasingly popular amongst the student population. It is submitted here that one of the main reasons that the subjects enjoy unpopularity is the fact that Property Law modules have never been made as seductive and attractive to the students as Criminal Law modules have been made[8]. Another point that needs to be made here is the fact that although Criminal law is highly unlikely to touch people's lives in the way that property law does it still remains a mystery why Property law modules are deemed so unpopular.

If we are to claim that Criminal law is aesthetically appealing to the student population simply because of the matter of promotion then it is fair to say that Property Law modules have not enjoyed that much of a promotion so to become popular. It might also be that simply Property Law modules lack an ethics of aesthetics[9]. They completely and utterly lack aestheticization. As a result they become less appealing to the student population. One of the main reasons for the unpopularity of the modules on Property Law is the high degree of difficulty associated to these modules[10]. Nevertheless, it is submitted that English Law and commonwealth jurisdictions have a very similar way of dealing with certain subjects and modules, which is normally fairly straightforward and consists of the application of the relevant case law and statutory provisions. Therefore the

[8]Hudson (2015). It is submitted, however, that despite there are notable exceptions Hudson's work is one of them that with constant reference to pop culture the nature of the Property Law modules becomes a bit more bearable.

[9]Maffesoli (1991). The notion of ethics of aesthetics is inextricable linked to Michel Maffesoli's work referring usually to modes of anesthetisation. The notion is deployed here for the purposes of the lack of a form of aesthetics in the nature of Property Law modules.

[10]Penner (2016). Even from the very early stages in his book Penner comments on the difficulty of the module of Equity and Trusts he claims: "Trusts is a gripping subject. Unfortunately it grips most students with anxiety. There is a good reason for this: it is difficult. Almost every topic in the law of trusts is complicated by demanding intellectual problems about the correct solutions by which academics and judges alike disagree"

aforementioned argument becomes weak and extremely inappropriate as to the degree of difficulty attached to Property Modules.

To a great extent might be the students' attitudes as to the nature of the subjects themselves. For example, the greater percentage of law students are slaves to the reputation of the subject. This is not helping as usually these subjects do not have the greatest of reputations. This sounds like a chicken and egg situation since reputations are strictly associated with the popularity of the subjects. Hence, if a subject is unpopular there is no way that it has a good reputation amongst the students' population. Reputations are not very difficult to be created through and in a Law School. There is usually a high degree of communication between the students at all levels[11]. Also nowadays in the electronic era that news travels fast it only takes a split of a second for Property Law subjects to gain and retain a bad reputation. Usually it is very difficult to get out of and nearly impossible to deal with or even try and battle with. Bad reputations of a subject are usually impossible to reverse and overcome amongst the students' population. It is highly at odds however, now entirely with the students' attitudes especially after the introduction of really high tuition fees by every singly University in the England. What is at odds with the ethics as well as the aesthetics of the legal profession is that historically these subjects the property law subjects were the bread and butter of every singly solicitor in the UK since the early history of the legal profession. In fact Property Law forms part of the historical tradition of the legal profession and is strongly associated with it. From this perspective, it is very difficult to fathom as well as imagine the unpopularity of the Property Law Modules amongst the student population.

It is possible, however, that despite the historical association of the subjects to the work of the legal profession, these has been substituted by the commodification of the legal profession in the UK and also the increasingly profit making nature of other subjects like commercial law subjects for instance. Nevertheless, this can also be set aside as an argument from the point of view that commodification has also affected Property Law subjects. There is a Commercial side to Property summarised as commercial transaction in Property Law and deals with commercial dealings only. So from this perspective, the disassociation of Property Law from the historical tradition of the legal profession does not necessarily provide a valid explanation and examination to the matter at hand. On the contrary, if anything it should have boosted the popularity of the subject simply because of its commercial side to it as well as its association with the historical aspects of the legal profession. If we are to accept that education has become a means to an end which justifies the increase in the tuition fees as well as a different attitude amongst the student population towards a profit making overall attitude then it follows that the commercial side to property law reinforces this[12]. However, what needs to be seriously taken into consideration is that Property law deals no matter how commercial in nature or not do not necessarily have the same appeal to law students as the large commercial deals that have nothing to do with Property. Studies reveal that the majority of law

[11]Garbado & Gulati (2000).
[12]Kennedy (1992).

students strive to become corporate lawyers[13]. In this kind of job there is no place for property law deals no matter how commercial in nature they are.

Another parameter that needs to be examined here is the very fact that despite the commercialisation of the modules, property law subjects/modules need serious revamping that hardly anyone is willing to risk let alone attempt. A number of reasons can be provided for this. Firstly and most importantly, it is seen a highly time consuming task that given the number of the cohorts of the law students in the English Universities, it is hard to believe that more time will go to a revamping of the syllabus, the opposite rather. Another possible reason is that the nature of the modules is so dry that it is disheartening to even begin to attempt a revamping of these modules. Instead a traditional and dry approach is usually adopted to the modules that makes it even harder for the students to follow and more importantly take a shine to. There is nothing aestheticized about it and it is even more possible that the closest that it ever gets to aesthetics is the use of an equally dry series of power point slides reflecting the very nature of the modules.

The Absence of Aestheticized Aspects in Property Law Modules

Aesthetics[14] in its ancient Greek meaning entails a sensuous approach to education. This sensuous approach that is evident in the teaching of other modules is hardly ever evident in the teaching of the property law modules. Hardly ever the case that land becomes aestheticized surprisingly enough given the day to day mundane going to the University and basically stepping or walking on a piece of land. These kind of examples hardly ever make it in textbooks which are equally dry a tendency that is easily transferred to the teaching of property law modules in large lecture theatres or even smaller seminar classrooms. Ironically enough property law modules are the epitome of the presence of the absence not just in a Derridean sense but in every possible sense of the word. A more emphatic absence is felt in the module of Equity and Trusts complementing the second one of the property modules taught on every LLB degree offered in the UK. The very nature of the module is abstract nevertheless, it is completely absent from everyday life. It is not something the students can identify with or even recognise in everyday transactions. It has nothing to do with the financial term equity used in commercial transactions. Equity and Trusts as a module carries with it ideas of natural justice, fairness even maxims[15] that today's generation are either unfamiliar with or carefully chose to ignore. In this sense the module is presently absent its only presence is being felt through the disastrous usually success rate in almost every University in the country. Students find it hard, almost impossible to say the very least to grasp, therefore they hardly ever take a shine to the module[16]. The only presence that it is being felt in regards to

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[13]Collier (2005). See also Collier (2006).
[14]Maffesoli (1991). See also Maffesoli (2007).
[15]Hudson (2015). See also Penner (2016).
[16]Hudson (2015). See also Penner (2016).

the module is its very presence in the syllabus of every qualified law degree, as a core module. Equity, therefore becomes necessity. It is a necessary module, a gatekeeper to a law degree. It is just another one of the core modules, usually termed the students' nightmare before the dream, the desired qualifying law degree opening the doors to a highly successful career usually as a commercial solicitor or a barrister. Law students in the UK have to go through it. They have to battle against its abstract nature. They have to deal with abstract notions such as conscience and unconscionability, something that really prevails the law and amends law's mistakes only that it is not exactly visible. It does not necessarily involve the senses as it is invisible, a completely different system that is not visible in the naked eye. Maybe it has something to do with everyday life yet again not really. Possibly, it is around them in the form of charities again involving a noblesse oblige, a noble mentality but it does not exactly enjoy the visibility and aesthesis of law. It dances on the edge of a paraesthesis, an illusion, of an abstract core module almost invariably lacking definitions, being associated rather often than not with philosophy, legal philosophy and a very uncommon law. Equity cannot be felt, cannot be seen cannot be tasted, nor heard, it can only be tested.

From another perspective, however, the only aesthetics applicable to Property Law modules is through teaching. This is where Equity and Land Law can really be heard, tasted, felt, touched upon and tested in the end. This is where aesthetics hints at a sensuous approach to teaching. Sensuality is used here in exactly what the term describes as aesthesis, hearing, seeing, touching, feeling[17] etc. Where the modules come alive on and off the stage of the lecture theatre where property law modules become a spectacle. Or maybe not, judging from the low numbers of attendance, the constant nightmare of the fellow academics colleagues throughout every single term duration, adding to the bad reputation of the property modules and to their unpopularity among the student population. This alludes to the constant challenge every single lecturer faces which is usually summed up in the ways of engaging and enthusing the students. Maybe the frequently asked question on interview panels for academic jobs on enthusing law students into the study of property law modules would have been fairly simple through the use of the image and use of VLE. However, it is exactly the same answer that seems pointless when tackling the modules of property law. Where the image is reduced to a mere symbol playing a decorative role right next to a case simply adding some colourful touches to an otherwise black letter and fairly substantive approach to the teaching of the property law modules. The possibility of land law winning the prize here exceeds expectations as Equity and Trusts cannot be posited amongst the modules that are easily cartooned whatsoever.

Recommended textbooks do not necessarily escape the dry nature and reputation of the modules. Their highly decorated and adorned front covers attest to the fact that simply there is nothing fancy about them. They merely add another component to the dry nature of the modules. Adam Gearey contends that the study of the property law modules remains dry in every sense of the word[18]. From this

[17]Maffesoli (1991).
[18]Gearey (2017/18).

perspective, innovation comes into play as a real challenge this time as it is a fierce fight up against the dry nature of Property Law modules. It is, at times, a personal bet to make the modules juicier by trying not to slavishly follow them. This, in many respects is a daunting task itself. If seen from a completely different perspective both Property modules, Land Law and Equity and Trusts constitute no exception to the traditional forms of legal education in play today on both sides of the Atlantic. Despite the popularity of aesthetic forms and in this sense more sensuous and at times sensual interpretation of law in practice, law students spend their lives in the law school committed to a systematic textual interpretation. Aesthetic forms requiring the presence of image remain tactfully hidden, relentlessly tacked away from law schools, with few exceptions, contradicting the multimedia world of contemporary organisational world of legal practice. Doctrinal study is viewed as more important, particularly given the limited time to cover the syllabus, often ten to twelve weeks. The gimmicky visual representations are not treated as facts and the fact-based art of legal persuasion remains profoundly a linguistic privilege. As a result, heavy reliance on textbooks in the teaching of both property modules attests to a reliable, less time consuming and less gimmicky way of approaching the teaching of the modules rather than relying on aestheticized forms of popular culture for example. Besides, the general assumption is that students are there to study law as they have already been socialised in general education at an earlier stage. Only to discover later that they lack critical thinking skills and that their general knowledge is limited. Surprisingly enough, the basic requirement of lawyers' work is to showcase understanding of the world around them. While this translates to a hands-on approach in legal education, teaching beyond what is formally acknowledged as law, hasn't made its way in the classroom yet.

Land and Equity go pop

The amalgam of law and popular culture hasn't always been easy to receive as a separate branch of research or to find its place in legal education and law schools on both sides of the Atlantic[19]. For many the aforementioned fusion has been deemed pervasive, if not laughable and for many others transgressive to say the very least[20]. It has only been in the recent years that law and popular culture has found a place in some exceptional law schools, which also constitute an exception, by way of certain research centres in England[21]. On the other side of the Atlantic the picture is largely similar, however, it is acknowledged that popular culture made its way more comfortably in the American legal education as

[19]Greenfield & Osborne (2006). See also Redhead (1995) on the unpopularity of Pop Culture.
[20]Redhead (1995).
[21]The first centre in English Law Schools dealing with these important issues, was the Centre for Law and Popular Culture in Manchester Metropolitan University, created by Professor Steve Redhead in the Law School. Around the same time chronologically, Guy Osborn and Steve Greenfield create the Centre for Law, Society and Pop Culture at Westminster Law School. Years later a similar attempt results in the creation of the centre for Law and Culture at St Mary's University, Twickenham.

opposed to the English Law Schools. Popular culture has been perceived as challenging the status of the law. Besides, it has always comprised something of a chthonian, subterranean and subcultural nature that debunks the very nature of law itself[22]. The legal profession has always perceived itself as distant from the masses, being part of a professional elite, socially representing a small section of the population. While this might have facilitated the resistance of law to popular culture, it seems that popular culture is acutely receptive to legal stories. For instance, representations of lawyers can be found in a number of films, TV series and literary works[23]. Gradually, portrayals of lawyers in literature and other forms of pop culture have become the subject of study in research centres specialising in law and pop culture on both sides of the Atlantic. Gradually pop culture made its way into law teaching but only in limited modules or as a module itself on both sides of the Atlantic[24].

The question, however, remains as to the benefits of integrating popular culture into the teaching of Property Law modules? Property Law modules are inextricable linked with popular culture. For example, one of the essential characteristics of the definition of popular culture is public consensus. Similarly, conscience seems to constitute the main undercurrent theme in both Property Law modules, Land Law and Equity and Trusts. In this sense, popular culture can be seen as integrated in the curriculum due to Property Law modules. In other words, popular culture defines Property Law and vice versa. On the same note, popular culture proposes drawing parallels with reality. This alludes to the approach taken in legal education and the teaching of Property Law modules termed "hands-on", dealing with realistic situations and scenarios. From this perspective, popular culture could potentially facilitate a fresher approach and outlook on the everyday. Therefore, integrating popular culture into Property Law modules encourages the sensuous, the use of the senses and eventually recalls aesthetics back into the teaching of Property Law. It also reinforces the relation of the abstract to the real. In this sense, integrating popular culture in the teaching of Property Law offers students the ability to experience, to see clearly, how abstract Property Law notions are potentially, nevertheless, inextricably linked to their everyday lives.

Law students are usually socialised firstly into popular culture as consumers, before they even become law students, before they even enter Law School[25], before they even start consuming Property Law textbooks. Embracing popular culture in the teaching of Property Law emphasises and reinforces the doctrinal approach to the module. Using popular culture approaches in the teaching of Property Law modules is appealing to today's law students, because they are habitual consumers of popular culture[26]. Allegedly, the unbearably intellectual lightness of popular culture makes Property Law modules more bearable, popular, and appealing to the law students' population. It is in this sense, as Friedman

[22]Greenfield & Osborne (2006). See also on the unpopularity of Pop Culture Redhead (1995).
[23]Asimow (2018). See also Bailey (2018).
[24]Friedman (1989).
[25]Bailey (2018).
[26]Batlan & Bass (2018).

suggests popular culture as the doctrine itself becomes the lens through which to study the Law, to actually study Property Law[27]. Embedding popular culture in Property Law modules constitutes a way of engaging and enthusing law students to the study of Property Law by making doctrine more alluring and vibrant for them[28]. From this perspective, invoking pop culture becomes a necessity, which reaffirms the necessary doctrinal presence of the Property Law modules in the curriculum, not the other way around.

Incorporating forms of popular culture into the teaching of Property Law modules enhances law students' critical thinking and research skills. From this perspective, it enables law students to have a better grasp of complicated and abstract notions and a better understanding of the interrelation between legal and cultural aspects[29]. For example, requiring law students to research forms of popular culture relating to issues of Property Law provides them with a plethora of different perspectives on the sensuous aspects of these modules. In this sense what they do, see, hear and taste in the course of conducting research then relates to the concrete reality of the classroom. In other words, they learn, how to act and think like lawyers through researching forms of popular culture for the purposes of Property Law modules. It is usually these kind of activities that expose them to the way film and other forms of popular culture depict Property Law issues. In emphasising the benefits of incorporating popular culture in the teaching of Property law modules, it could be said that it can supplement theoretical and experiential teaching methodologies by allowing students to "see" processes they might otherwise never witness[30]. This in other words, emphasises a sensuous and experiential approach to the teaching of Property Law modules. Incorporating popular culture in Property Law modules introduces an element of surprise, potentially an element of humour into the classroom alleviating in this way the daunting nature of these modules[31].

Incorporating forms of popular culture into the teaching of Property Law modules contests the deification of the courtroom. It breaks away from the dry nature of the modules by introducing elements that law students enjoy. It is not uncommon to use aspects of popular culture, such as clips out of films, full-length films in the teaching of law[32]. Studies show that law students particularly enjoy watching and analysing films in law schools. It is perceived as a striking contrast from the typical, substantive approach usually adopted in the teaching of law. Increasingly, legal educators also use legally themed television shows in order to expose different pedagogical techniques and enthuse law students into the study of law. Nevertheless, this approach needs to be tested on other modules. The suggestion put forward for the purposes of this article is that legal educators

[27]Friedman (1989).
[28]Meyer & Davis (2018).
[29]Corcos (2018).
[30]Sherwin (2018).See also Sassoubre (2018) and Papy (2018).
[31]Bailey (2018).
[32]Fisher (2018). See also Miller (2001). It is worth noting at this point that Miller's contribution is one of the notable exceptions to associating Pop Culture to the study or research of Equity and Trusts, together with Hudson's textbook. It is hardly ever the case that the module of Equity and Trusts is associated with any issues of Pop Culture in its entirety.

need to broaden the range of modules in which aspects of popular culture are used as well as the range of forms of popular culture used. The use of appealing images[33] and kinds of music can equally serve the purpose of engaging and enthusing law students in the study of highly unpopular modules such as Property Law. Incorporating forms of popular culture in the teaching and study of Property Law in other words, does not necessarily have to confine to the use of certain forms of pop culture[34]. An example could be the concept of home featuring in both modules, from a completely different perspective, Land Law and Equity and Trusts. A house that becomes a home, the buying and selling of a house or the breaking down and dissolution of a marriage and eventually of home, constitutes just some of the few main themes often depicted and portrayed in films, clips of songs and literary works.

The interdependence of the narrative, the storytelling in both popular culture and legal culture needs to be examined in order to assess the validity of incorporating pop culture in the teaching of Property Law modules[35]. Pop culture has always influenced the legal tradition and vice versa. In this sense the two are permeable. Legal narrative, legal storytelling has always borrowed from pop culture storytelling. It is the meeting of the two oral traditions in a sense. Legal narrative has constituted the main subject matter of many films, literature, TV series, comics etc.[36] On the other hand, many stories that are told in the courtroom derive from pop culture. This can be subject to two interpretations. The first interpretation relates to the original definition of pop culture and refers to stories being narrated in the courtroom that refer to members of the public. The second interpretation refers to actually following the same aesthetics and architecture of the case resembling pop culture references found in movies and literature. From this perspective, using pop culture methodologies in the teaching of Property Law could potentially equip law students with the necessary skills required in modern day legal practice like the skills of persuasive storytelling[37]. This also alters the perception to the teaching of the modules. In this sense, Property Law modules become a storytelling process, which emphasises and embodies shared cultural mythologies and affinities. Property Law modules cannot be separated from the contexts that gave birth to the doctrines that constitute the main tools of experiential classroom. Pop culture references in the teaching of Property Law modules facilitate storytelling in visually engaging ways. The visualisation of information of pop culture in the teaching of Property Law, through the use of films, entailing colourful images[38], ensures the promotion of interest and depth of learning. The main aim of this is simply to connect students of Property Law modules to what they already know. In other words, incorporating popular culture references to the teaching of Property Law Modules simply reconnects law students as popular culture members to processes of storytelling in law. This

[33]Porter (2018). See also Fisher (2018).
[34]Schulz (2018).
[35]Sassoubre (2018).
[36]Watkins & Guihen (2018). See also Asimow (2018).
[37]Sassoubre (2018).
[38]Austin (2018).

approach breaks away from a dry, logic deducting technique and reintroduces an aesthetic approach to the Property Law modules. The use of the word aesthetics in this case does not necessarily refer only to the senses, therefore relating only to the visual. It also relates to its connotation as emotion. Visual exercises through pop culture reference create the potential in Property Law modules for the law students to come to terms with the potential range of emotional as well as perceptual associations[39]. Incorporating pop culture references in the teaching of Property Law modules helps students not only to express themselves orally but also visually. Property Law modules in this sense become visually reconstructed and deconstructed by enriching the rule-based, case-driven legal curriculum.

Studies on law and popular culture have always fleshed out the hero and villain dichotomy, either when concentrating on the study of certain characters or when narrating the eccentricities of lawyers on the screen. This dichotomy is not that easily defined and clear cut when it comes to the storytelling of Property Law. It is almost non-existent, absent. However, it captures the layperson's attitude and eventually that aporia in Property Law. Law students who study these lay attitudes in law school can then incorporate them as they need to in their professional work later on. In that way, they can move closer to one of their goals, to be more capable and informed actors and representatives of the legal system. Popular culture creates a new topos[40], place and space in the study of Property Law modules. After all the Greek meaning of the word topos has always been associated with the meaning of land, landscape, state and property. This topos can be reflected in the legal classroom as a means of a creation of inroads, a path to a different approach to the teaching of Property Law modules summed up in the amalgamation of the old with the new. The new narrative, the incorporation of popular culture, as Said and Silbey suggest, creates a renegotiation of the older narrative conventions and forms by shaping and forming new communications[41]. In the teaching of Property law modules the creation of inroads through the incorporation of popular culture amounts to a renegotiation of legal analysis of property law, to a reconnection in other words of these modules to new experiences of the present, while at the same time reflecting on the past. It creates a renegotiation of the legal skills that law schools on both sides of the Atlantic so proudly provide.

Conclusion

This article attempted to offer some explanations on the unpopularity of Property Law modules. It suggested that this unpopularity resides in the technical nature of the modules and the complete and utter lack of an aestheticized approach to them. It also suggested that this is due to the students' attributes and attitudes towards these modules. It also put forward the suggestion that one way of

[39]Fisher (2018). See also Mezey (2018).
[40]Said & Silbey (2018).
[41]Fisher (2018). See also Mezey (2018).

reintroducing aestheticization to these modules is through the incorporation of pop culture in the teaching of the modules. It also examined the potential benefits incorporating popular culture entails. Property law issues often feature in forms of popular culture. Apart from an amusing examination of legal stories, popular culture can provide useful insights into how actually Property Law operates. The aestheticization of Property Law modules provides the platform to equip and prepare future lawyers for the challenges of the modern day organisational practice. Proposing the incorporation of pop culture into the study of Property Law modules goes beyond taking popular culture seriously. Popular culture is not restrained to cinematic representations of lawyers and the legal system. Above all pop culture is constructed upon people's beliefs, opinions and customs in exactly the same way that Land Law and Equity and Trusts are.

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Accounting Standardisation, Systemic Fissure and Fraud: The Concatenated Causal Nexus Neglected

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The process of convergence between the national accounting standardisation and the International Accounting Standards Board, in order to break with the rules-based approach and to house the leading edge of rule by principles in accounting, alludes to a credible and constructive evolutionary journey from the purely and strictly accounting point of view. However, there are compelling reasons that warrant caution in making a favourable and categorical opinion on the transposition of accounting standardisation's approach, since the scientific nature of accounting is incapable in itself of providing a more accurate argument about the contrast between advantages, and especially the drawbacks, of scriptural rule-making and principles regarding the generation of systemic fissures that create favourable conditions for the practice of corruption through fraud in accounting entries. This paper promotes a brief review of the benefits, costs and conjuncture of opportunities and risks arising from the adoption of both systems, resulting in a critical analysis that encourages the search for conciliatory and innovative alternatives.

Keywords: *Accountability: Corruption; Fraud; Standardisation.*

Introduction

In order to unify and improve the financial disclosure and the operation of the market with a high standard of quality, the beginning of the century was marked by a movement of convergence of accounting standards, abandoning the traditional model based on detailed rules for the various economic events accountable with the aim to produce comparability of information with the lowest content of subjectivity, to adopt an account standard based on principles, also known as International Financial Reporting Standards (IFRS), and edited by the International Accounting Standards Board (IASB), which permits the accountant to interpretation at the time of recognising, classifying and disclosing economic events, so that it most appropriately reflects the economic essence of the operation according to its professional judgment.

However, aside from the predominant adoption of the international standard-based accounting standard set forth in IFRS, the US system has adopted a goal-based normative model that, roughly speaking, is a hybrid construction of the two standards cited above, which is highlighted by its focus on overcoming gaps in both accounting standards.

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In this vein, the central issue of this paper is devoted to analysing how the weaknesses of these accounting normative systems can influence the practice of corrupt activities through accounting fraud. Thus, the systemic fissures of these models become another important aspect of the fight against corruption, as important as other matters of order, such as money laundering, strict liability of the legal person, international legal cooperation, asset recovery, et cetera.

The objective of the present study is justified by the importance of accounting activities as a support and concealment of corrupt activities and its incipient attention by the academy and public anti-corruption policies. The excessive focus on the normative and social aspects of corruption, in an exclusionary perspective regarding accounting, results in an embryonic production of scientific works and legal and regulatory norms dedicated to the fight against accounting fraud under a conjunctural view of corruption, that the present the article is proposed to reflect.

Considering that the research problem of this work is the verification of how the normative gaps of accounting systems create opportunities or discourage accounting fraud, which in turn support corrupt activities, this paper seeks to answer the following questions: How do systems accounting policies influence the practice of accounting fraud? What are the main characteristics and differences between accounting standardisation models? Which model of accounting standardisation presents fewer risks for the accounting fraud exercise? In what way can adequate accounting normative system influence individual decisions by corrupt practice?

This production contributes to the discussion of this subject in the first chapter, based on the examination of normative accounting models based on rules, principles and objectives, delimiting its main aspects and employing a comparative analysis with the critical support of doctrinal arguments. Next, it is verified how the fissures of accounting normalisation systems influence the practice of corruption, observing both its technical-accounting aspect and its psycho-social aspect, in order to satisfactorily reach the solution of the research problem.

The methodological structure of the research adopts a qualitative approach to the collection of data and information, which, according to Hartmut Günter[1], is the most appropriate approach for the discovery and construction of theories based on a textual search, whose data collection, in the different techniques are interpreted hermeneutically. The adoption of qualitative research is justified because it is a propitious approach to reach an understanding about the phenomenon under study through explanations or understandings of the relations between variables.

Moreover, the present research still adopts the exploratory level about the object of study, since its main purpose is the clarification and modification of concepts and ideas, providing an approximate general view about a certain fact[2]. This in this case is the verification of the literature regarding standardisation

[1]Günter (2006) at 202.
[2]Gil (2008) at 27.

and accounting fraud to verify if there is a conflict between accounting normative models and the correlation with fraud.

According to Antonio Carlos Gil[3], it is developed from material that has already been produced and is mainly composed of, from scientific books and articles, with the main advantage being that it allows the coverage of a much broader range of phenomena than could be investigated directly by other means.

Accounting Normalisation Based on Rules and Principles and The Advent of The Objective-based Approach

There are, within accounting science, a plurality of divergent conceptions about the purposes of accounting, whether through a more scientific view or a more pragmatic perspective, as can be seen by the contrast between Hendriksen & Van Breda conception in a restricted scope to the calculation and the presentation of the net profit resulting from a set of rules of accomplishment and tie[4], and the thought of Howard Noble[5], centred in the presentation of information that reflects the relation between the commercial operations and their impact in the property.

Brazilian doctrine is replete with other theoretical contributions with the same purpose of engendering efforts to bring light to accounting thinking, as can be seen in the reading of Domingos D'Amore & Adaucto Castro[6], Silvio Crepaldi[7] and Hilario Franco[8]. However, in view of so many theoretical propositions regarding the purposes of accounting, the Federal Accounting Council (CFC), in its Resolution 774/1994, presented a pertinent premise that illustrates the initial thinking of the present study. According to the pronouncement contained in said normative instrument, there is a tangle of specific objectives that are not lucky enough to be primordial to the definition of a science, the objective of Accounting being the correct presentation of the equity and the apprehension and analysis of the causes of their mutations.

In this way, the crucial role of Accounting for its various users, reflected in the accounting statements that affect business management, market development and financial system governance, is undeniable. In the light of its role in guiding the way in which the operators reflect the economic essence of the operations, it is important to note the prominence of the studies that favour the normative approach[9].

The academy shares a reasonable consensus regarding the need to establish a normative standard that will serve as a reference for professionals, predicting the failures of the marketing mechanisms, as well as their contrariness to social

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[3]Gil (2008).
[4]Hendriksen & Van Breda (1999).
[5]Noble (1956).
[6]D'Amore & Castro (1976).
[7]Crepaldi (1995).
[8]Franco (1997).
[9]Kothari (2001).

interests. The divergence lies in establishing the appropriate model to be adopted for the better attainment of this end, and it is therefore important to briefly consider the concept of true and fair view.

The concept of true and fair view establishes the prevalence of a true and fair view of the real economic and financial situation of the business, as well as its results, prevailing, above all, legal and regulatory[10]. In objective terms, this premise confers a higher degree of subjectivity to accounting operations and greater autonomy to its operators, so that in situations where the professional understands that the rules corrupt the economic essence of certain records and disclosures, the concept of true and fair view is prioritisd to the detriment of normative forecasts.

Despite the attempt to guarantee security to grant the highest degree of freedom to choose the accounting criterion through the necessary referral to the independent auditors, the objective of this concept is very optimistic and carries a reasonable weight regarding its supremacy over the legal requirements and accounting principles, being plausible the instrumentalisation of the expression by managers so that they could do what suited them[11].

The rules-based Generally Accepted Accounting Principles (US-GAAP) model adopted by the United States reflects the aforementioned positioning, repelling the concept of true and fair view in favour of the objectivity of accounting valuations, restricting the auditor to a qualitative analysis of financial reports and strict observance of detailed accounting rules that translate customs, the basis of the Common Law system in force in that country[12].

Prior to the approximation of the normative accounting model based on rules, in the best methodological interest, it will be discussed about the accounting system based on principles, in which is the prevalence of the essence on the form. Principle-based accounting systems have as their basic assumption the direction of accounting standards by an open-ended conceptual framework that suppresses specific criteria for the evaluation of particular situations and then entrusts it to the value judgment of accounting professionals[13].

In spite of the definition of the normative model based on the principle-based approach, this system is endowed with characteristics that define it in relation to the system based on rules, that is, the establishment of norms that only have basic guidelines, the influence of the concept of true and fair view, the search for the best expression of economic and financial reality, procedures with a high subjectivity burden, high evidence of transactions and events, the prevalence of the essence of the transaction or economic event over the legal form, judgment of the accounting professional and greater degree of autonomy for presenting information[14].

Brazil has initiated the first efforts to harmonise with the international accounting standards contained in the International Financial Reporting Standards

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[10]Dantas, Rodrigues, Niyama & Mendes (2010) at 7.
[11]Jreige (1998) at 1.
[12]Paulo, Carvalho & Girão (2014).
[13]Schiper (2003).
[14]Paulo, Carvalho & Girão (2014).

(IFRS), published by the International Accounting Standards Board (IASB), in the last two decades, with special attention to the edition of Circular 3068 of the Central Bank of Brazil, the creation of the Accounting Pronouncements Committee, the issuance of CVM Instruction 457/2007 and the promulgation of Law 11,638/2007. This process of convergence with international accounting standards has given the Brazilian accounting model a progressive nature, with the proper proviso that it is a position not yet pacified in doctrine, although the Accounting Pronouncements Committee, which studies, prepares and makes technical pronouncements, has given an opinion in defines of the current principle-based standard.

In other mats, there is a rule-based accounting system, which pursues a completely different approach, with detailed norms that provide specific methods for the treatment of all problems and expected situations[15]. The rules-based accounting model has as its characteristics the condition for greater comparability of information - given that there are controversies in the doctrine - detailed rules that reflect accounting procedures, pragmatic observance of normative terms, high degree of objectivity, evidence of economic reality[16]. In addition, it is important to note that, in the case of transactions, the legal requirements are not met.

US-GAAP is the US regulatory accounting system based on a mitigated framework of rules, with detailed implementation and interpretation guidelines coupled with a certain degree of principiology, justified by corporate scandals involving US companies Enron, WorldCom and Tyco in the early 2000s, which cast doubt on the effectiveness of the US accounting model, but that did not force the nation to completely succumb to its standards in favour of international convergence. After several attributions of guilt to the then rule-based accounting model, which by its failures allowed for financial engineering actions capable of transgressing the legal regime, the US Congress enacted the Sarbanes-Oxley Act, which in Section 108 led to the adoption of an objective-based disclosure standard[17].

The normative accounting model by objectives invokes imperfections in principles, as well as rules, based models, and ends by deconstructing both models to propose an accounting system that raises the objectives of accounting standards to the level of protagonism, which must be clearly defined and sufficiently detailed. The objective approach is believed to outweigh fraud gaps because the imposition of accounting objectives in the direction of procedures minimises the opportunities for manipulation of accounting reports, as well as avoiding exceptions because they are contrary to the essence of the standard[18].

It is not relevant to the present study to discuss the normative accounting system by objectives alone, because its focus is grounded on evaluating the validity of abandoning a previously widely used approach with the purpose of proposing the adoption of a new vision under the aegis of "progress". Before

[15]Benston, Bromwich & Wagernhofer (2006).
[16]Paulo, Carvalho & Girão (2014) at 26.
[17]Alexander & Jermakowicz (2006).
[18]Paulo, Carvalho & Girão (2014) at 28.

the reading of the divergent accounting models, it is necessary to highlight its merely expositive explanation, being primordial a critical analysis on its effects and consequences by means of a comparative approach, exposed in the following chapter, before deepening the discussion on its consonance.

Critical Examination of Accounting Models based on Principles and Rules

Preliminarily to the examination of normative accounting systems, it becomes relevant to clarify a fundamental assumption for the current under analysis, without which it is impossible to reach the objectives of the present study. Accounting standards cannot be applied in a completely consistent way, whether based on principles or rules, because there will always be some limitation that will make it possible to deviate in the application and effectiveness of the rules. Thus, we advocate the inconsistency of certain aspects and the existence of other elements that can be used in both approaches[19].

With regard to the debate about the inconsistency, which ravages the reforms carried out by the main accounting standards, two important approaches must be highlighted: the inconsistency with the content of accounting standards issued by accounting regulatory bodies and the inconsistency of the application of these standards on the factual plane[20]. It is certain that the two concepts are interlinked, so that if there is no consistency in the application of the accounting criteria, enforcement of these standards is impaired.

When the process of convergence of the Brazilian rules-based accounting system, previously based on rules, started to be adopted, several specialists, due to the influential campaign promoted by the Federal Accounting Council, listed negative factors of what they considered as "Outdated" model and extolled the benefits of the "new breakthrough" of accounting. The present production assumes the opposite, highlighting benefits and limitations of both systems, initially approaching the rule-based model and posteriori the principle-based model.

Katherine Schipper[21] points to the increase of comparability as a benefit of the rule-based model, which, in short, means the decrease of divergent professional opinions due to the high degree of specificity of the rules. However, if the rule is not strictly adhered to, it is necessary to consider the existence of a false comparability which, consequently, gives equal treatment to non-similar businesses.

Another positive effect associated with the use of detailed norms, is the mitigation of the probability of biased interpretations. However, according to the authors, this same detailing of the rules opens the door to financial engineering arrangements that masked accounting entries in contradiction to their purposes under the veil of a superficial compliance with the rules[22].

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[19]Paulo, Carvalho & Girão (2014).
[20]Wustemann (2010).
[21]Schiper (2003).
[22]Nelson, Elliot & Tarpley (2002).

The increase of verifiability is another benefit that accompanies rule-based normative systems, because in theory, the detailed guidelines lead professionals to be guided by a knowledge base resulting from the common consensus, resulting in the reduction of divergences of a measurement. However, the degree of specificity of these rules leads to an increase in costs with specialists who interpret them safely and at the same time allows professionals with a high accounting knowledge to be hired to structure contracts in order to circumvent the rules[23].

As we have seen, the rule-based accounting model has benefits and disadvantageous effects, and the same reasoning applies to the principle-structured system, so that by the following exposition the inconsistencies of both models allow us to infer that none of these formally surpasses the imperfections of the other[24].

The first positive effect of the principle-based accounting normative model rests on the comparability of information, which, as in the rule's regime, has positive and negative aspects. The suppression of scope and treatment exceptions makes information more comparable, but on the other hand, this same agreement with the professionals' discretion results in the coexistence of different interpretations, causing some imprecision[25].

Due to this discretion delegated to professionals before the material opening of standards, expert judgment becomes essential and, ultimately, intensifies the responsibilities of auditors and accountants, demanding greater investment in the educational system, otherwise it will make its users, as an example of investors and companies, the most impaired[26].

The intensification of auditors 'and accountants' responsibilities due to the increase in the subjectivity of accounting standards, while contributing to the quality of professional judgments, also leads to the resistance of auditors who fear pressure from opportunistic demands from corrupt managers, increasing the costs of accounting activity or even discouraging it due to the risks of accountability in the civil, administrative and criminal spheres arising from corporate pressure for fraudulent postings. In addition, there is coexistence with the malicious error, the culpable failures arising from the increase of imprecision of the norms and that lead to the objective responsibility of the companies, thus raising the costs with the implementation of conformity programs that guarantee the effective alignment of the demonstrations with the norms accounting. In the same sense, the adoption of the principles makes accounting standards more accessible to understanding and implementation, as well as making the adjustment to the economic substance of events easier[27].

In the face of all the positive and negative aspects of both of these accounting normative systems, there is no scientific study that has precisely chosen which is the best alternative, so much so that the United States has

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[23]Nelson, Elliot & Tarpley (2003).
[24]Schiper (2003).
[25]Schiper (2003).
[26]Alexander & Jermakowicz (2006).
[27]Nelson, Elliott & Tarpley (2002).

found a third alternative along with the whole clash between[28]. However, this whole process of reflection follows another tangent that can be summarised in a single question: would it be possible to harmoniously coexist between the elements of both normative accounting systems?

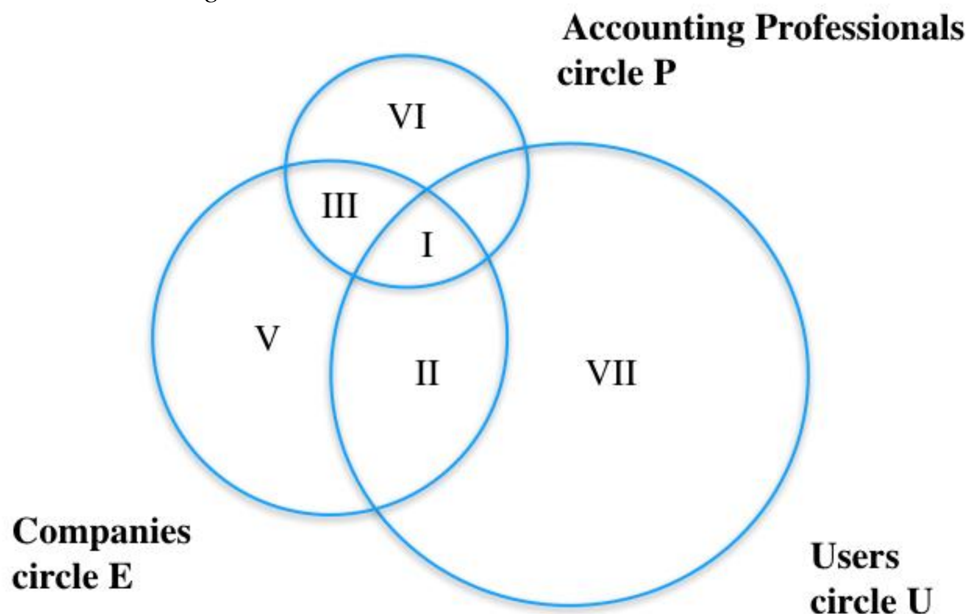
The Convergence of Principles and Rules in Accounting Standardisation

As to the possibility of harmonious coexistence between principles and rules, a priori, one can safely affirm such a thesis, as well as corroborate it by means of empirical arguments and theoretical bases. The overcoming of rules-based norms and principles in favour of a conciliatory alternative that adds to the advantages and obliterates the disadvantages of both systems has its support in the factual plane through the US approach to accounting objectives.

The standardisation by accounting objectives consists of a kind of hybrid system, which integrates the best characteristics of the rules and principles systems under the guideline of accounting objectives, which, in turn, are determined by harmonising the interests of groups of companies, users and accounting professionals[29].

According to the Venn diagramme, these three groups preserve a constant interaction marked by a conflict of interest around the accounting information, as follows:

Figure 1. *Venn Diagramme*



Source: R.M. Cyert &; Y. Ijiri in Paulo, Carvalho & Girão (2014) at 29.

The group of companies has an interest in the set of accounting information evidenced in the financial statements, while the users have an interest in information that is useful for economic decision making, and the group of

[28]Antunes, Grecco, Formigoni & Neto (2012).
[29]Paulo, Carvalho & Girão (2014).

professionals with interests focused on the production and validation capacity of the companies accounting information[30].

In the middle of the conflict of interests between the three groups, expressed in the diagramme above, standardisation by objectives, aims to prioritise the interests of one of the three groups, defining them as the objectives of the accounting system. In the case of the United States, US-GAAP, following the intent of the Sarbanes-Oxley Act, privileged the financial market professionals, with particular attention to investors. The adoption of the accounting objectives is intended to simplify the rules-based rule system previously in force, which contains a considerable amount of exceptions, and "this makes new rules necessary to explain previous ones, increasing the volume of reading, more exceptions and more complexity. This is all due to principles that are not well defined”[31].

In other words, rules-based regulation adopts a very broad coverage approach of all possible situations in the accounting process, which leads, therefore, to the issue of more rules for each new situation that arises and that was not covered previously or every time accounting facts become more complex.

In the same way, it was noted that the normalisation by principles allowed for several inaccuracies, due to the open content of the norms, generating the possibility for opportunistic interpretations and a systemic imbalance that could compromise the purposes of said norms.

Thus, the Security Exchange Commission (SEC), the US government agency that regulates compliance with securities market laws, proposed accounting standardisation by objectives because it believed that the approach contained a sufficiently detailed structure, without the exaggeration of rules and without principles so that the professionals can perform the accounting procedures in accordance with the users' instances.

In addition, it is necessary to emphasise that the present production does not aim at electing the normative accounting model based on objectives as the ideal scope to be adopted by the accounting systems. On the contrary, the objective is to recognise the ability to combine rules and principles in a single regulatory system.

Rules and principles have diverse characteristics and roles in a normative system. Basically, rules are conceived under the logic of "all or nothing", in which they are or are not fulfilled, facing strictly a question of validity, whereas the principles have degrees of concreteness that vary according to the factual and legal conditionality, and as they can coexist with antinomic principles, in a process of balancing values and interests[32].

There is no ideal normative scope that contains only principles or just rules, since both balance the limitations present in its bulge, and the rules are necessary to regulate conduct, and the principles are like mechanism of foundation, interpretation, integration and direction of these rules[33]. Although such thinking

[30]Paulo, Carvalho & Girão (2014).
[31]Paulo, Carvalho & Girão (2014) at 29-30.
[32]Alencar (2006).
[33]Lima (2014).

has been drawn from a juridical work that has examined the dynamics of rule-based principles and rules applied to law, the general plans for such conception can be transposed into the accounting field, and its origin finds factual support from recent initiatives of the FASB to include a series of rules to its originally rules based on principles, demonstrating a tendency to become a normative system by objective, according to US-GAAP[34].

Although Brazil is on the road to convergence of its accounting standards with the international standards of the IASB, its new application is not yet effective, as there is a strong influence of the legal determinations on accounting standards regarding corporations, as well as of the fiscal legislation that exerts strong lease transactions of a financial nature. The principle-based accounting model landed in Brazil rooted in a very optimistic view without the proper academic debate with the breadth and scope necessary to consider the issue of cultural impact, the lack of professional expertise and the degree of preparation of knowledge centres. On this aspect, its important note that:

> The relationship of benefits and costs, opportunities and risks, advantages and disadvantages, positive and negative aspects of adopting accounting systems based on principles or rules increases the importance of the arguments presented in the SEC study, that the best solution is not necessarily if you choose one model or another. The solution can be an intermediate system, which objectively addresses the intrinsic function of Accounting, clarifying the economic-financial situation of the company, increasing the predictive condition on the part of the user[35].

The reflection on the ideal accounting model to be adopted by a country is not limited to an analysis of accounting issues, but it is a matter of examining the needs of its various users, especially as regards the conflict of interests between these actors and can result in corrupt acts of accounting fraud. Anticipating the premise adopted in the next chapter, an important guiding aspect of the understanding of the postulated thesis, rule-based norms based on principles are presented as an ideal model, since both have inconsistencies that directly affect the qualitative characteristics of the information financial institutions.

Fraud as a Result of the Systemic Fissure of Accounting Normative Models

It is a peaceful position in accounting doctrine regarding the susceptibility of fraud in accounting entries that, under certain conditions, can be favoured. Among the existing variables considered by science, the systemic flaw created by accounting standardisation, and which provides an uncountable number of possible manipulations of the records and accounting information, is the object of investigation of the present study.

[34]Shields (2006).

[35]Dantas, Rodrigues, Niyama & Mendes (2010) at 25.

Fraud perpetrated through the manipulation of records and accounting and financial information for the purpose of diverting resources and providing personal gains of an illicit nature starts with the introduction in the accounting literature of the term "creative accounting" to refer to exploiting the flaws and weaknesses of accounting standards which enable the presentation of financial statements that reflect the desired image, but which do not necessarily correspond to what it would actually be[36].

Virtually all conceptions that seek to define creative accounting consider the opportunity generated by gaps in accounting standards as a constituent element of their conceptual structure, i.e., the process of constructing accounting standardisation is a significant factor for the creation of possibilities of fraud, since the simulation of accounting facts with real appearance uses the weaknesses of accounting standards, whether by legal voids, high degree of subjectivity, incompleteness, among others.

It should be noted that the recognition given by the accounting doctrine about fraud under the mantle of creative accounting is imprudent and inadequate, since it masks the shadowy element behind the opportunistic and manipulative technique of certain users of accounting, giving them a denomination that mitigates its seriousness, that is, corruption. In the same sense, José Juan Blasco Lang[37] adds:

> The term creative accounting has been introduced in the accounting literature to describe the process by which knowledge of accounting standards is used to manipulate accounting statement figures and is in fact a euphemism used to avoid referring to these practices by their real names, devices accounting, manipulation or accounting fraud.

Thus, it must be said that the use of the term creative accounting to refer to accounting fraud is inadequate, since they have differences of a finalistic nature. The creative accounting also can be seen as the process of carefully managing the gaps in accounting standards, admitted in a context of flexibility and omission of the standards themselves, consciously influencing the financial position within the limits of the rules of the game, without any purpose of misappropriation of assets. On the other hand, accounting fraud consists of the intentional act or omission of those responsible for the preparation of accounting information, outside the legal framework, inducing recipients to error to sponsor misappropriation of assets[38].

Accounting fraud is an important upholder of corruption as it is an indispensable tool for masking illicit transactions and hiding the origin and the real destination of financial amounts. In this way, money laundering from corrupt activities cannot succeed without the essential support of fraudulent accounting techniques that take advantage of normative loopholes to produce

[36]Lainez & Callao (1999).
[37]Lang (1998) at 10.
[38]Santos & Grateron (2003).

opportunistic interpretations with the aim of conferring an appearance of legality to illicit activities.

More recently, Brazilian legislation timidly recognised the role of accounting fraud in sustaining corrupt activities, through Federal Decree No. 8.420/2015, which regulates Act No. 12.846/2013, known as the Corporate Anti-Corruption Law, which, in item VI of article 42 , imposes the accuracy and completeness of transactions in the corporate records as one of the parameters for verifying the effectiveness of anti-corruption integrity programs.

The flexibility of accounting standards can be associated with the creation of situations that allow the occurrence of typical facts of creative accounting, which, in the best of words, result in fraud, since, in the last analysis, they are nothing more than opportunities for ethical deviations from to hide illicit activities such as money laundering from bribery of public agents, financing of terrorism, tax evasion and avoidance, among other crimes.

As an alternative to prophylactic creative accounting, the ethical regulation of the accounting activity performed by accountants and auditors, with the main objective of preventing the accounting operators from being seduced by the facility and impunity on practicing of corrupt conduct:

> To this must be added the own flexibility present in accounting standards, more in some countries than in others, which allows to use several criteria to account for the same economic fact. In this context, the so-called "creative accounting" arises, which is part of the intentionality of companies to take advantage of the existence of subjectivity, existing alternatives and the vague regulation of some accounting aspects in order to obtain financial statements that represent the desired image[39].

This paper disagrees with the above-mentioned proposal, since legal doctrine has already established a solid understanding in the sense that ethical sanctions per se are not enough to curb corrupt conduct by not being able to independently achieve so many elements that influence choice of individuals. The rational choice theory provides the basis of this thought by establishing that an individual profile guided by the concept of rent-seeking, according to which, people are guided by a teleological rationality linked to the maximisation of the most effective means to achieve their purposes in function of their own interests[40]. In other words, individuals, as rational beings, in the quest for self-interest, decide for corrupt practice after a valuation of the costs and benefits of the activity, performing it when the benefits outweigh the costs of accomplishing it.

Obviously, formulated rational judgments have a subjectivity charge that makes them legitimately unstable, since the cost-benefit assessment of illicit conduct will vary according to each individual with his or her own biography associated with the encompassing context in which it is found. However, the doctrine provides common elements that influence the decision-making process of rational individuals in relation to corrupt behaviour, and there are several

[39]Kraemer (2004) at 10.
[40]Gomes (2014).

theoretical models that translate said decision-making process into an equational mathematical structure, such as the Becker model[41], and the latest Olken & Pande model[42] that is transcribed below:

$$w - v < \frac{1-p}{p}(b-d)$$

This model gathers the different options that influence the decision making of individuals. It follows from the premise that the individual has an income of any nature, and can be a salary, for example, represented by (w). In considering the possibility of fraudulent conduct, the person takes into account the probability of being discovered (p) and, as a consequence, suffer an undesirable consequence on his or her primary/official source of income, such as, for example, dismissal from office occupy, and perceive another lower income, or moral ostracism, conceived as an external option (v). However, it is also considered that the conduct can be successful, going unnoticed and receiving the proceeds of illicit activity (b), such as bribery, subtracting the costs inherent to the corrupt practice (d), such as the silence of third parties, the payment of employees, money laundering, among others.

The model proposal is to provide an initial probability parameter for the occurrence of fraudulent conduct and is very prone to corruption when the product of the difference between the income (w) and the external options (v) is less than the net proceeds of the corrupt activity that are (b) subtracted their costs (d) and multiplied by the probability of detection (p).

What is meant by this reflexive process is to demonstrate that there are as many other factors as the moral ethics that make up the set of options that the individual takes into account when deciding to carry out a fraudulent conduct. Professional regulations with ethical content contribute to the weight of the "external option" variable, however, studies show that sanctioning content standards on freedoms and property have a greater disincentive impact on unwanted conducts.

In this sense, Calabresi & Melamedi[43] proposes a classification of the sanctioning norms that, duly adopted, create disincentive costs of conduct, that is, the norms of responsibility and inalienability. The liability rules impose a penalty equal to the amount of damage caused by an unlawful act, seeking to restore the previous patrimonial situation of the subject whose right was violated, and which in the legal order is supported by the theory of civil liability inserted in article 5, item X, of the Federal Constitution, and in article 186 of the Civil Code. The norms of inalienability and reserve to the assets of life to which society confers a maximum and unquestionable value that needs greater protection, culminating sanctions higher than the expected benefit of the potential offender

[41]Becker (1968).
[42]Olken & Pande (2012).
[43]Calabresi & Malamedi (1972).

with the objective of punishing and, at the same time, discouraging the conduct, characterised in the criminal norms of the Brazilian legal system.

In Brazil there are a number of normative sources that seek to combat accounting fraud, such as the codes of ethics of voluntary adherence, such as the Code of Ethics of the Professional Accountant, approved by Resolution No. 803/1996 of the Federal Accounting Council. The Brazilian Accounting Standards and the Accounting Principles are other administrative standards, issued by the Federal Accounting Council, which aim to guide accounting activity towards ethical standards of subjectivity control.

In addition, there are administrative organs of internal and external control that seek to ensure compliance with ethical standards of accounting and to restrain, although not specifically, accounting fraud by means of manipulation of entries and records. The capital market has a more aggressive control than the rest of the Brazilian private sector, since this sector of the economy has the Securities and Exchange Commission (CVM), an autonomous entity in special regime, linked to the Ministry of Finance, with administrative authority independence, lack of subordination, stability of its directors and financial and budgetary autonomy, to exercise effective control over the professional activities of this specific market, especially with regard to the control of accounting information and auditing of publicly-held companies, in order to provide greater security to its users, as is clear from articles 1 and 2 of the Act No. 6.386/1976.

In the public sphere, the internal control of accounting activities in Public Administration is exercised by the Audit and Controlling Courts of the Union, States and Municipalities, within the scope of executive power, exercising an audit role of public accounts, having as legal basis the article 70 of the Federal Constitution, which explains how the internal control of the Legislative, Executive and Judiciary Powers should operate and establishes the accountability mechanism. This control extends, at federal level, to municipalities and public foundations, based on article 5 of SFC/MF No. 2, of December 20, 2000. External control is a function conferred by article 71 of the Federal Constitution to the Powers Legislative, being of competence of the National Congress at the federal level, of the Legislative Assemblies in the States, of the Legislative Chamber of the Federal District and of the Municipal Councils in the Municipalities.

However, Brazil is slowly moving towards legal-criminal responses against accounting fraud, because even after a series of scandals involving Brazilian companies and falsification of accounting entries, it has not yet been enough for national legislators to criminalise with specific criminal type accounting fraud and to protect the trust and good faith of private relations as a legal right to be protected by criminal law. The 2001 corporate insolvency scandal of Enron, one of the largest energy companies in the world, due to the accounting manipulation of the company's public statements that resulted in a $ 22 billion debt and the bankruptcy was enough to create chaos over the US economy and culminate in the Sarbanes-Oxley Act (SOX), which, among other provisions, provides for a series of criminal sanctions for acts of forgery, alteration or

destruction of accounting documents and frauds against shareholders and creditors with false information, in addition to the objective liability of the legal entity.

The most recent and most notorious case in Brazil was the accounting fraud operated by Banco PanAmericano, discovered by the Central Bank in a special inspection focused on credit assignment, in 2010, when it was discovered that a breach of more than 5 billion of Brazilian currency which was masked by duplicity of credit portfolios in the financial institution's balance sheets.

Even though Brazil has not taken any legislative measures of a criminal nature to combat accounting fraud, which is momentarily punished as a crime of tax evasion when it reaches the treasury and with administrative fines imposed by the regulatory authorities, such as the Central Bank, it is notable the national inattention regarding the gaps caused by accounting standardisation that, besides constituting a significant factor in the (dis)advantaging of accounting fraud, has less bureaucratic-procedural obstacles to its reform compared to the federal legislation.

The recognition of the indispensable consideration of accounting normalisation in the debates about accounting fraud is endorsed by the doctrine, as clarified by Maria Kraemer by associating the normative gap as a factor intrinsically related to creative accounting:

> Creative accounting practices are one of the most controversial topics today. The expression "creative accounting" has been part of the accounting language, causing a great impact in the economic, financial and managerial areas. The phenomenon of creative accounting has been the result of the flexibility of certain accounting standards, which facilitates the manipulation, misleading and misrepresentation of information[44].

Although the author states that the flexibility of accounting standards as a causal factor of accounting fraud through the manipulation and falsification of accounting records, it should be emphasised that rules-based rules, which, by their nature, confer a specificity or completeness to the rules, against flexibility, can also stimulate accounting fraud by diverting its interpretation and application. In this way, accounting fraud goes far beyond manipulating the degrees of freedom allowed by the rules, but generally consists of the process by which accountants use their in-depth knowledge of accounting standards to manipulate unduly the accounts included in the accounts of company[45], either because of the flexibility of principles-based standards or because of the over-specificity of rules based on rules.

Accounting standardisation can unequivocally be a facilitator for fraud, which is why it is urgent to establish a model that makes such a corrupt activity more difficult to practice and at the same time increases the likelihood of fraud detection by weighing the propensity to corruption to the right axis, thereby focusing positively on the decision of the potentially corrupt individual in the sense of influencing him not to carry out the fraudulent practice.

[44]Kraemer (2004) at 10.
[45]Amat, Moya & Blake (1997).

The above-mentioned doctrinal analysis points to an increase in the flexibility of accounting standards when they are guided by principles, as the current Brazilian standardisation guides, in the wake of the International Accounting Standards Board, since the material content open to a greater margin of interpretation while at the same time eliminating the overlapping of norms, it also leads to a scenario of imprecision due to the coexistence of a multiplicity of possible readings, among which tendentious appreciations arise for the purposes of misrepresentation, often departing from the coercive pressure of corrupt executives on accounting professionals, especially when there is a relationship characterised by the vulnerability of the accountant or auditor vis-à-vis the manager.

In the same sense, the principles-based international accounting standards may create opportunity for accounting fraud:

> [...] the IASB decided on accounting normalisation based essentially on principles and not rules, understanding that this would provide better quality of information to users and second, that most accountants are ethical, honest and well trained and have to make judgments and estimates that lead to a better picture of the entity's financial position.
>
> On the other hand, since accounting policies and standards cannot cover all aspects of business transactions, there is considerable scope for entities to use alternatives, interpretations, judgments and estimates in the measurement of assets and liabilities, and in some cases, the very subjectivity and complexity of standards contributes to the use of "good accounting" harmful practices known as creative accounting or results management[46].

On the other hand, the return to the old system of rules-based accounting norms also does not eliminate the potential of accounting fraud, since the greater specificity of the rules creates barriers to comparability and consequent misconception of fairness between businesses, creating excessive controls for some too slow for others, which in certain situations can create timely scenarios for fraud. The inherent exhaustiveness of the rules can also transgress the true purposes of accounting, since it does not assume optimising warrants, which end up leaving the accounting entries under the mantle of a superficial conformity, when this does not lead to the complexity of the rules in view of the excess of watertight determinations that enable financial engineering intelligences to circumvent these rules in a sophisticated way.

Such flaws that accompany normative approaches to accounting, also called normative gaps, that create timely contexts for accounting fraud practice, consist of true systemic fissures, since when the normative system that regulates accounting activity alone is not capable of to curb fraudulent activities and still generates the opportunism or permissibility for such conduct, to face an imperfection that affects the entire regimental set. No norm within a normative complex has an autonomous existence, but it coexists with interdependence

[46]Niyama, Rodrigues & Rodrigues (2015) at 84.

with the other norms that compose this system, and therefore, the failure of one norm results in the affectation of all others, making the whole regulatory system weak and questionable.

A robust and sound accounting standard system, coupled with the effective application of appropriately proportionate sanctions and asset recovery, accurately complements the probability of detecting accounting fraud and makes external options unsatisfactory, respectively, thus discouraging predilection for the practice of the illicit act. In other words, when normative weaknesses are eliminated, making it difficult to practice accounting fraud, their probability of identification is increased, which in turn interferes with the rational process of individual choice through the exercise of corrupt activity, in order to raise their costs in relation to its benefits, thus making fraudulent behaviour discouraging in view of the high degree of risk.

Given the duality of positive and negative aspects of the principles and rules approaches and the susceptibility of these to the practice of fraud, the normative accounting by objectives can overcome the eliminatory logic between the principles based on principles or rules and brings a perspective of conjugation of both approaches within the concept of objectives, considering that the best solution is not necessarily in the choice of a model or another, but in the option of an intermediary system, which observes the primary purpose of accounting, which is the clarification of the economic-financial situation of the company and the amplification of the predictive condition by its users[47].

The goal-oriented accounting normative system addresses the shortcomings of both the rules-based model and the principles-based model, because of its consistently established detailing structure with sufficient detail that does not compromise the effectiveness of standards. This picture is visible in eliminating the use of percentage tests characteristic of detailed rules and in overcoming the lack of operational guidance regarding the demand for accounting judgments without the availability of sufficient structure for such judgments.

Thus, it is concluded that proper accounting standardisation per se is not sufficient to effectively combat accounting fraud without due observation of the other aspects that influence the rational decision of individuals in relation to corrupt conduct, however, accounting standardisation is *conditio sine qua non* in the set of strategies that impact the variables of the individual decision making process, which justifies the importance of their understanding and correct application.

Conclusion

This study has the purpose of verifying the possibility of occurrence of fraud due to breaches in accounting standards. According to the analysis implemented, it was evidenced that both rule-based and rule-based accounting standards have weaknesses that favour accounting fraud, demonstrating that the

[47]Dantas, Rodrigues, Niyama & Mendes (2010).

process of replacing the rules-based model with the principles-based model did not mean a progress positive in the fight against fraud, the most ideal model being the North American based on objectives.

It is important to note that, although accounting fraud does not receive the same attention as other types of corrupt activities such as bribery, it is equally relevant in the fight against corruption, since most of it is an activity to support the success of corruption. Because of this scant attention to accounting fraud in Brazilian expertise literature, accounting fraud is constantly confused with creative accounting that consists of better manipulation of accounting records to reflect better results for companies within the limits of legality, while accounting fraud simulates a better image of the company that does not reflect reality and creates an illusory appearance of stability over time.

What differentiates an accounting fraud for the graphical movement and the possibility of making use of a cutting-edge tool and interfering in the information of the users of the characteristic accounting information of the first time, while the latter does not prejudice or prevent its users to enjoy its benefits.

There is a fine line between creative accounting and accounting fraud that can deprive the character of a technique for the lawful manipulation of accounting standards to reflect a better corporate appearance on the market and attract investors and become a tool that distorts standards and code of professional ethics to mask illicit activities and mislead users of financial information.

Accounting fraud is a corrupt practice that is harmful not only to the recipients of accounting information, but to the market as a whole, as it is capable of degenerating social values and creating a culture of impunity. For this reason, it is necessary, as one of the measures to combat accounting fraud, to uniform accounting standards to create barriers to the manipulation of regulatory loopholes to commit fraudulent actions.

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Human Rights in the Arab World: A Regional Legacy in Crisis

By Dina Hadad[*]

In the wake of the so called 'Arab Spring' the contentious reality of human rights in the Arab world remains one of the core reasons of populace dissatisfaction. Despite the recorded improvements in terms of facing development challenges, revolutions and counter revolutions erupted to declare a rejection of status que and demand more respect to individual rights. This historical change calls the reconsideration of a regional legal culture that reflects a clear struggle to establish a judicial legacy protecting human rights over states. This paper looks into the regional legal mechanism offered by the Arab Charter on Human Rights and the limitation to its relevant Commission and Court practice. Other regional and universal contexts will be visited to identify best practice and available limitations. This will include each of the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR).

Keywords: *Human Rights; Arab World; Judicial Legacy; Development; Regional Treaties;*

Introduction

While development of human rights standards alongside the theoretical debate took place in Western regional context, in terms of civil and political rights Arab countries are committed internationally to each of the standards set by the International Covenant on Civil and Political Rights and the Arab Charter on Human Rights. The later however entered into force in 2008 and in terms of enforcement its relatively recent established committee for human rights received limited number of reports and hence have little to offer in terms of implementation and enforcement.

In the Arab world the discourse on human rights was always overloaded with Western values and colonial legacy. The Arab Charter of human rights went through stages of amendments before its revised draft received enough ratification to enter into force. The Charter is seen by the wider international community as an opportunity for the Arab states to confirm their commitment to international standards. Nonetheless the formation of the Charter propagated ongoing debates of cultural relativism and universality of human rights. In the context of minimum standards of human rights, the Arab charter seems to be consistent with the language and standard offered by other international treaties

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although domestic application offers experiences that stand short of these standards[1].

The legal transformations that have taken place across the globe with regard to management of natural resources and climate justice provide a valuable insight into the complex nature and development of Human Rights as a subfield of international law specifically with regard to the need to uphold rule of law in times identified as an escalating state of crisis. The Arab world as a developing reality is transfixed by recurring themes of conflict and security, which remain embedded within the historical legacy of colonization and independence. The consequential reality of the region today offers no change in the existing themes and discourse. The wave of revolutions and counter revolutions since 2011 recreated a conflict and hostility to International law. All of these multifaceted threads became historically entrenched within a fragile landscape dominated by a security discourse while still struggling with economic and human development.

Regional efforts to set standards of human rights are so essential in making the change in states and maybe individual perception of human rights values. Although court decisions, by establishing legal precedents, constitute a form of strong standard setting, regional arrangements are also successful at diffusing and reinforcing human rights norms and standards in their regions in cooperation with member states. To understand the level of commitment the Arab Charter is aspiring to reach by its provisions with regard to minimum standards of human rights, this paper examines similar provisions in other relevant international treaties namely the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR). While these treaties developed in different regional and cultural contexts the evolved body of international jurisprudence provides a significant source of reference and offers multiple insights into similar practices and experiences.

The most visible contributions of regional human rights arrangements usually occurs in the form of court rulings and attempts by commissions to sway the behaviour of member states[2]. In the context of the Arab Charter individual cases are yet to be considered by the Arab Court for human rights which seems to be a reflection of an existing domestic reality that subordinates human rights to national security. While considering the problematic relation between the Arab World and development of human rights as a domestic application, it is essential to remember that any legal culture of a nation is significant in terms of how citizens recognise not only the judiciary but also the political system at large. The manner in which legal institutions function also has an effect on a country's political, economic, and social development performance. While law is intended to produce a just society, it is ultimately a social structure that has gone through a political process[3]. The pedagogical set of questions with regard to whether law changes society or society changes the

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[1]Natarajan (2012).
[2]Human Rights Council (2017).
[3]Fairclough & Fairclough (2013).

law remain in fact in the centre of any critical study methodological or contextual Study[4].

In line with the main focus, this paper will highlight the phenomenon of a ‘permanent state of emergency’ as one of the most challenging types of emergency situations. Permanent emergency is described as ‘the permanent character that derogation assumes in some countries in other words the maintenance of the derogation measures for a protected period even though the emergency has ended’. The *Questiaux Report*[5] refers to a number of other types of emergencies and considers the permanent emergency under the ‘institutionalised emergencies’ category. ‘These are processes that have… formed part of a theoretical approach to democracy which gives rise in different areas to concepts of so-called “authoritarian”, “restricted” or “gradual” democracy’[6].

For this purpose, the next section will start by presenting a brief picture of the historical development of the legal concept of derogation and some of the more important studies and international efforts with regard to emergency powers. After that, the legal standards provided by derogation clauses in human rights treaties and the most relevant judicial interpretations of these standards will be explored.

International Law Limitation or Derogation

While the United Nation Charter 1945 provides for the promotion and respect of human rights and refers explicitly in its preamble to the strict manner in which the use of force is permissible in times of conflict[7], the Charter does not contain any detailed provision about the possible limitation or derogation of human rights.

The Universal Declaration of Human Rights, 1948 contains a general limitation clause but makes no reference to the derogation of human rights during states of emergency. Article 29 (2) sets out that:

> *“(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”*

In addition to addressing the limitation of human rights and freedoms, Article 29 refers indirectly to the duties that an individual has with regard to the community. Furthermore, it establishes that while a limitation to a right is

[4]Davies (2007).
[5]Questiaux, N. (1981). [Hereinafter – The Questiauz Report].
[6]*Questiaux Report,* paras 129-145
[7]Preamble of the United Nations Charter available at http://www.un.org/aboutun/charter/

to be allowed, a set of principles is to be respected to ensure that the core of the right remains effectively protected[8].

Article 3, common to four *Geneva Conventions 1949*, sets the most important standards in humanitarian law which applies in War and armed conflicts:

> *"(1) Persons taking no active part in the hostilities, members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria*."

Article 3 identifies further the acts which shall remain prohibited 'at any time and in any place whatsoever' with respect to the above-mentioned persons. Thus, clearly Article 3 provides for a minimum standard to apply during an internal conflict under all circumstances. However, Article 3 falls short of offering a tight clause to regulate derogations in states of emergency.

Apart from Article 3 which covers only the case of war, international law regulating the derogation of human rights during states of emergency has often been considered by United Nations organs, conferences of experts, scholars, and a variety of different organizations. Organizations and scholars have given special attention to this phenomenon in an attempt to prevent human rights violations in times of emergency. Although relatively little has been said about the deviant phenomenon of a permanent state of emergency, this phenomenon has not been completely ignored.

Limitation

It is vital before discussing the derogation clauses in human rights treaties to briefly consider the nature of derogation from human rights obligations as compared with limitations on the exercise of human rights under normal circumstances.

Derogation and limitation clauses are similar in that they limit a state's obligation in the area of human rights; however, the two concepts serve different purposes. While limitation intends to restrict the extent to which obligations of human rights apply because of a serious situation, derogation indicates a total suspension of specific rights because of an extreme emergency.

Limitations are sometimes described as 'ordinary' limitations since they can be imposed permanently and in normal situations in times of peace. Derogation, however, is called an 'extraordinary limitation'[9]as it is designed for particularly serious emergencies that require the application of extraordinary measures.

Based on the recognition that most human rights are not absolute, the exercise of certain rights is generally accompanied by certain limitations that

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[8]Daes, E.-I.A. (1994) at 132. These principles are also relevant to the derogation of human rights.

[9]Sevensson-McCarthy (1998) at 49-51.

can be imposed in order to protect the rights and freedoms of others and national security. Rights and limitations are laid down in law, and these restrictions are necessary, as the UDHR clearly recognises in Article 29, for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society. Thus, the purpose of the limitation is to provide boundaries for the exercise of individual rights in favour of the rights of others or a specific public interest in normal situations, and therefore the limitation can be permanent.

Although similar, the derogation clause is designed to accommodate the needs of the state *vis-a-vis* the rights of individuals; it primarily seeks to allow governmental action to violate recognised individual rights in a period of extreme emergency beyond what governments could lawfully do in normal times. Thus, the concept of derogation is based on its temporary and exceptional nature[10].

The rationale behind the derogation clause permitting the suspension of the exercise of certain rights is only for the purpose of restoring normality and to guarantee the exercise of the most fundamental human rights. It requires the possibility of legally suspending the exercise of certain rights temporarily as the only means of guaranteeing the effective enjoyment of the most fundamental ones.

Some have considered, however, that the two concepts are very closely linked and 'rather than being two distinct categories…they form a legal continuum'. This close linkage is further evidenced by the fact that it is only when limitations on human rights are proved to be insufficient to maintain peace and order that derogations may be applied in accordance with certain strict conditions[11].

Earlier debates in the drafting of derogation clauses under the ICCPR and the ECHR reveal that there has been confusion as to the application of these terms[12]. In the drafting of the ICCPR, it was argued that the eventualities of the derogation clause were sufficiently covered by the relevant limitation clause and that the limitation clause could be invoked in times of emergency[13].

Derogation Clauses

European Convention on Human Rights 1950[14]

Article 15 allows a contracting state the possibility to derogate from its obligations in times of emergency:

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[10]Gross (1998) at 440.
[11]Sevensson-McCarthy (1998) at 49.
[12]U.N. Doc. E/CN.4/Ac.1/4, Annex 1 at 5 and 7. See also U.N. Doc. E/CN.4/82/Rev.1 *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation,* pp. 3-5 and vol. i of the preparatory work, ECHR, Collected Edition, i.208.
[13]Oraa (1992) at 27.
[14]Entered into force in 1953.

> *1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

The threat must be to the life of nation, and the measures taken must be proportionate to the threat to the extent strictly required by the situation and consistent with other obligations under international law. Under Article 15(2) certain rights can never be derogated from: the right to life (Article 2), prohibition of torture, inhuman or degrading treatment, or punishment (Article 3), prohibition of slavery or servitude (Article 4.1), and criminal offences must not be retroactive (Article 7). Finally, Article 15(3) states that a member state has to inform the Secretary General of both the declaration and lifting of a state of emergency, and explain what measures have been taken and why.

International Covenant on Civil and Political Rights, 1966[15]
Article 4 provides:

> *1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

Similar to Article 15 of the ECHR, Article 4 ICCPR provides that a member state may derogate from its obligation only if the life of the nation is threatened. However, Article 4 adds that the state of emergency must be officially proclaimed. Measures taken should (1) only be to the extent that they are strictly required by the exigencies of the situation, (2) should not be inconsistent with the state's other obligations under international law, and (3) should not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin, which is an additional requirement to those provided by Article 15 ECHR. Article 4(2) lists a number of rights which are considered non-derogable even during a state of emergency: the right to life (Article 6); prohibition of torture; inhuman or degrading treatment or punishment (Article 7); prohibition of slavery or servitude (Article 8); prohibition of imprisonment on the grounds of inability to fulfil a contractual obligation (Article 11); prohibition on prosecution for offences which were not crimes when committed (Article 15); the right to recognition everywhere as a person before the law (Article 16); and freedom of thought, conscience, and religion (Article 18). Finally, Article 4(3) states that derogation and termination of any derogation must be reported to other states parties through the Secretary General.

[15] Entered into force in 1976.

American Convention on Human Rights, 1968[16]
Article 27 of the convention provides that:

> *"1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin".*

Particular standards are set for a state party: (1) the threat must be to the independence or security of a state party, (2) measures taken must be for the period of time strictly required by the exigencies of the situation, (3) these measures must not be inconsistent with other obligations under international law, and (4) they must not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin. Under Article 27(2), suspension of the following rights is never permitted: right to judicial personality (Article 3), right to life (Article 4), right to human treatment (Article 5), freedom from slavery (Articles 6), freedom from ex post facto laws (Article 9), freedom of conscience and religion (Article 12), rights of the family (Article17), right to name (Article 18), rights of the child (Article 19), right to nationality (Article 20), right to participate in government (Article 23), and the judicial guarantees essential for the protection of such rights.

Arab Charter on Human Rights 2004

The current Arab Charter was adopted in 2004 by the Council of the League of Arab States after the revision of an earlier version that was adopted in 1994 but not ratified by any member states. The original Arab Charter on Human Rights was adopted by the Arab League in 1994. However, it was widely criticised at the time by many human rights organisations both within the region and beyond as failing to meet international human rights standards, and not one Arab League state was prepared to ratify it. The Council of the Arab League adopted a number of Resolutions in 2002 encouraging the modernization of the Charter to correspond with international human rights standards.

The Arab Human Rights Committee was established in 2009 to supervise the implementation of the Charter by its member states through state reports and periodic reports. The Committee also submits annual reports to the Council of LAS. As of September 2016, the ACHR has been ratified by 17 out of 22 member states of the LAS. However, the Arab Charter on Human Rights includes many provisions that still raise the issue of compliance with international

[16]Entered into force in 1978.

standards, especially with regard to gender equality, the death penalty, and the right to derogations under emergency law.[17]

Article 4(1) states that measures taken should be to the extent required by the exigencies of the situation, consistent with state obligations under international law, and should not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin.

Article 4(2) provides a list of fifteen rights that are non-derogable even in exceptional situations. These are (Articles5-30): right to life, freedom from torture, right of security of person, to a fair trial, freedom from unlawful detention, no crime or punishment without prior provision in the law, freedom from imprisonment as a result of a failure to fulfil contractual obligations, the right to due process and fair trial, freedom from inhuman or degrading treatment while in detention, recognition as a person before the law, freedom of movement, the right to political asylum, the right to a nationality, and freedom of thought.

Finally, Article 4(3) states that derogation and termination of any derogation must be reported to other state parties.

Similarities and Differences

Similarities

The derogation clause in each of the treaties contains: requirements that the emergency threaten the life of the nation and the measures taken are strictly required by the exigencies of the situation. They also include a list of non-derogable rights; and a number of procedural obligations.

Differences

With regard to what constitutes a state of emergency, the ICCPR refers to a 'public emergency which threatens the life of the nation' while ECHR explicitly adds the case of war. The ACHR used a different approach and the wording 'war, public danger, or other public emergency that threatens the independence or security of the state party'. The ArabCHR however refers to 'exceptional situations of emergency'.

Despite this recorded history of the derogation clause, it appears that it came earlier, from a UK proposal to the UN Human Rights Commission in 1947 at the beginning of the drafting process of the ICCPR. The preparatory work (*travaux preparatories*) of the Commission demonstrates that in 1949, the Commission adopted Article 4. After that, the European Convention borrowed the derogation clause from the draft Covenant—which had had the benefit of almost three years of discussion among the drafters of the UN Covenant on Civil and Political Rights—which explains the wording similarity in the

[17] Rishmawi (2005).

clauses[18]. Following that, in 1968 at the San Jose Conference, the drafters of the American Convention modelled their clause on the previous two treaties.

The first text that can be found to define an emergency is the one proposed by the UN Commission on Human Rights to the Economic and Social Council (ECOSOC), which contained the expression 'in time of war or other public emergency'[19]. This expression was discussed in depth by the Commission in the following session[20]. In light of these discussions, the principal choices made by the Commission were the following:

(1) In general, there was agreement on the suppression of any reference to war because it was felt that the Covenant should not envisage, even by implication, the possibility of war, as the UN was established with the object of preventing war[21].

It is interesting to note that when the European Convention was being drawn up, the UK proposed the adoption of a derogation clause similar to that of the draft Covenants; in fact, the Convention borrowed from the latter the expression 'in time of war and other public emergency'. Ironically, the UN Commission later suppressed the mention of war and the European Convention approved the former wording[22].

(2) The drafters preferred to adopt a broad term such as public emergency, which in principle could embrace several situations.

(3) The provision of a further qualification of the term 'public emergency' requires that in order for the situation to justify the declaration of emergency, there should be a threat that is truly exceptional and affects the whole nation, thereby removing the risk of derogation in situations of less importance[23].

(4) The term 'nation' was preferred to 'people' because the word 'people' might give rise to some doubts as to whether it denoted all people or just a portion of them. 'National emergency' became the term normally used to describe a state of emergency in the article as it embraces all of the people in the state and provides the only justification for derogation.

(5) The derogation clause in the ICCPR, ACHR, and Arab CHR requires an official proclamation of emergency; whereas, Article 15 ECHR does not mention the need for an official proclamation.

(6) While the ICCPR, ACHR, and Arabic CHR[24] emphasise the requirement that measures taken are not to 'involve discrimination on the grounds of race,

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[18]Fitzpatrick (1994) at 55.

[19]UN Human Rights Commission (1947), report to the ECOSOC on the 2nd session (1947) *ESC (VI) suppl. I, annex B I*, Article 4.

[20]Oraa (1992) at 11-17.

[21]UN Documents A/2929, p.67, para.39. *E/CN. 4/SR. 330*, 1 July 1952. Several representatives opposed the inclusion of the word 'war'.

[22]Text of Article 4 adopted by the Commission on 14 June 1949); UK proposal of 6 March 1950 to the European Convention, ECHR, 'Travaux préparatoires' to the Convention,*Collected Edition* at iii. 280.

[23]Sevensson-McCarthy (1998) at 200-212.

[24]This requirement was not included in the original Charter adopted in 1994; it has been added in the Revised Charter of 2004.

colour, sex, language, religion or social origin', such an emphasis is missing from the clause in the ECHR.

(7) The four clauses in the four treaties contain different lists of non-derogable rights—four rights in the ECHR, seven rights in the ICCPR, eleven rights in the ACHR, and fifteen rights in the Arab Charter on Human Rights.

As important as the above-mentioned standards are, their true worth can only be gauged by the effectiveness of the mechanisms provided for their enforcement. A sufficient body of jurisprudence has emerged in the past four to five decades under these instruments, notably under the regional conventions, to enable an assessment and comparison of their effectiveness in addressing the human rights problems associated with states of emergency. Much of the controversy has centred around the ability of the mechanisms to inquire into and adjudicate upon two issues: (i) the genuineness of emergencies claimed by governments as meeting the definitions (including the temporal factor and permanent states of emergency) laid down in the respective instruments; and (ii) the need for particular measures derogating from the provisions of the instruments to meet the actual threats facing a state (*de facto* emergencies). An attempt will be made in the next paragraphs to summarise the jurisprudence on these points.

Main Studies

Great efforts by inter-governmental and non-governmental organisations have been devoted to develop comprehensive standards for states of emergency. For example, the Martins study[25] for the ACHR and the Questiaux report for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities canvass available information about the behaviour of states during emergency situations, categorise the types of human rights abuses that appear to be associated with emergencies, and offer a set of recommendations directed to national authorities[26]. NGOs and academics in recent years have also attempted to elaborate sets of general guidelines for controlling human rights abuses during states of emergency[27]. These guidelines can be found in the 1984 'Paris Minimum Standards of Human Rights Norms in a State of Emergency' adopted by the International Law Association, the Siracusa Principles of 1984, the 1987 Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence, and the 1990 Turko/Abo Declaration of Minimum Humanitarian Standards.

Some of these studies remain a great inspiration for further research and investigation (for example, Fitzpatrick's critique and representation of the typology of emergency and the Minimum Standards adopted by the International Law Association). Others have been severely criticized on the basis of their clinging to a 'model hypothesis' and ignoring or showing

[25]OEA/Ser.L/VII.15, doc.12 (1966). [Hereinafter - Martins Report].
[26]*Questiaux Report* and Martins Report.
[27]Fitzpatrick (1994) at 70-77.

unwillingness to acknowledge the frequency of deviations such as the implementation of permanent states of emergency. More recently, a study by Gross and Ni Aoláin provided a profound investigation of emergency powers and contended that a clear gap exists between theory and practice[28].

The following paragraphs will provide a brief account of the most important studies with regard to the earliest efforts and important relevant academic analysis.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities in Resolution 10 (XXX) of 31 August 1977 expressed its deep concern with the manner in which certain countries applied the provisions relating to situations known as states of emergency and requested two of its members, Questiaux and. Perdomo, to undertake the preparation of a study about state practices in these situations. A report was completed in July 1982.

The Questiaux Report stressed that bringing situations of emergency into effect must be consistent with democratic principles[29]. This established link suggested three comprehensive principles: the legislation governing emergencies should be pre-date the occurrence of the crisis, and this legislation should contain prior control procedures stating that it is to be applied as a provisional or temporary measure. The report identified a profile pattern suggesting a reference model and 'deviations' from the model[30]:

(1) States of emergency are not reported. The formal emergency is not reported to treaty implementation bodies; (2) de facto states of emergency during which rights are suspended without proclamation or notification, or the suspension of rights is continued after termination of a formal emergency; (3) permanent states of emergency, which covers perpetual emergencies either as a result of de facto systemic extension or because the constitution has not provided any time limit a priori; (4) complex states of emergency involving overlapping and confusing legal regimes through the partial suspension of constitutional norms and far-reaching decrees; and (5) institutionalised states of emergency under which an authoritarian government prolongs an extended transitional emergency regime with the purported, but questionable, aim of returning to democracy and the full reinstitution of constitutional guarantees[31].

Questiaux's conceptualisation of emergency places a marked focus on the procedural mechanisms that allow for emergencies to be legally validated by municipal law. These include primary formal procedural guarantees, substantive guarantees, and the actual implementation of guarantees[32]. This framework contains an assumption that the existence of these formal requirements is sufficient to assure the protection of human rights in situations of exigency and consequently ignores *de facto* perpetuated states of emergency or 'permanent emergencies'[33].

[28]Gross & Ni Aoláin (2006). *Martins Report* was also undertaken aiming: to examine the history of the state of siege, to determine if it is possible to set general principles that could be binding on all countries in the region.
[29]*Questiaux Report,* at paras 34-35.
[30]Questiaux Report at paras 96-145.
[31]Fitzpatrick (1994) at 21-23 and Gross & Ni Aoláin (2006) at 407-310.
[32]*Questiaux Report*, paras. 40-63
[33] Gross & Ni Aoláin (2006) at 307-310.

Gross and Ni Aoláin contend that the Questiaux Report, like much of the policy and legal analysis that followed, seems to miss an essential challenge, namely that most emergencies fail to conform to the formal typology. They argue that while Questiaux certainly notes the existence of permanent emergencies, her study seems to understate their widespread use by states. Further, Gross and Ni Aoláin consider that Questiaux's remarks on the scope of the study underscore its 'formalistic' approach, and thus its inherent limitations:

In theory, the de facto situation which constitutes the exceptional circumstances is thus without legal validity (a) in municipal law, as long as a state of emergency has not been proclaimed, and (b) to a lesser degree in international law, as long as the state of emergency has not been the subject of communication to the competent international bodies.[34]

Studies assert that the Questiaux Report does not completely ignore the permanent emergency problem. It addresses and defines the phenomenon as the state of emergency that arises 'with or without proclamation...either as a result of de facto systematic extension or because the Constitution has not provided any time limit a priori'. However, the study identifies three common features of permanent emergencies:

Less and less account is taken of the imminence or otherwise of the danger; the principle of proportionality is no longer considered to be fundamental; no time-limit is envisaged[35].

In 1983, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities charged Ms. Daes to prepare the report 'The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights'[36]. Daes discusses the principles that should govern the limitation, restriction, or interference of rights and freedoms. These principles include: the principle of legality; principle of the rule of law; principle that human rights and freedoms are absolute and that limitations or restrictions are exceptions; principles of equality and non-discrimination; principle of a fair and public hearing in judicial proceedings; principle of proportionality; and principle of acquired (vested) rights. This study emphasised, that these principles, while focusing on the limitation clause of Article 29 of the UDHR, are equally relevant to the derogation of human rights[37].

In 1985, the International Law Association, adopted a set of minimum standards to govern the declaration and administration of an emergency[38]. These standards are intended to ensure that even when a government declares a *bona fide* state of emergency, basic human rights continue to be observed and

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[34]*Questiaux Report* at para. 24.

[35]*Questiaux Report*, para 112-117 at 28. The same set of features has been emphasised by the ILA study, Chowdhury (1989) at 47-*49*.

[36]E/CN.4/432/Rev.2 https://digitallibrary.un.org/record/52410/files/E_CN.4_Sub.2_432_Rev.2-EN.pdf

[37]Sevensson-McCarthy (1998) at 49-191. Also Siracusa Principles 1984 were the outcome of a non-governmental conference, but they are a valuable reference for the interpretation of the derogation clause provided in the ICCPR.

[38]*The Paris Minimum Standards of Human Rights adopted by* ILA in its 61 conference in 1984; see Lillich (1985) at 1072.

respected and call upon states that are in a state of emergency to be subject to judicial or other review. This study provides a typology of the emergency situation under the two categories of *de facto* and *de jure* emergencies. It highlights as well that the exclusive focus on 'formal' states of emergency barely scratch the surface of the widespread phenomenon of human rights abuses associated with states of emergency[39]. The Association defined the permanent state of emergency as a 'pattern of systematic extension of state of emergency which results in giving it a permanent status', and refers to the features of permanent emergencies mentioned in the Questiaux report.

The International Commission of Jurists undertook a comprehensive analysis of states of emergency throughout the world that performed an in-depth examination of the practices of nineteen countries that had experienced states of emergency in the 1960s and 1970s[40]. A number of relevant points were identified: (1) a distinction can be made between transitional regimes of exception with democratic goals and those with authoritarian goals; (2) resorting to a state of emergency corresponded in many situations to a government's desire for and commitment to legalism; (3) states of emergency were frequently hidden by the exercise of excessive powers without formal acknowledgement of the existence of an emergency (de facto state of emergency); (4) empirical evidence demonstrated the tendency for a state of emergency to become perpetual or to effect far-reaching authoritarian changes in pre-existing ordinary legal norms; (5) in some cases, excessive use of emergency powers was partly explained by the persistence of absolutist moral values and political habits; and (6) the abuse of emergency powers was frequently a result of disregarding constitutional and legal safeguards rather than inadequacies in law *per se.* It has been argued that what is most notable about the study is that of the fourteen countries considered in the in-depth examination (excluding the Eastern European States), nine fall into the category of permanent states of emergency. Only two countries, Canada and India, fit the exemplary emergency model that is the working assumption of the major studies on emergency norms.

Some of these studies and their critique could provide some insight to how international studies focusing on emergencies have replicated to an extent the oversight by some historian and theorists when considering differences between types of emergencies.

[39]Chowdhury (1989) at 6-25; Fitzpatrick (1994) at 3-20.

[40]International Commission of Jurists, States of Emergency; their impact on Human Rights (Geneva; international Commission of Jurists, 1983); examined emergencies in Argentina, Canada, Colombia, Ghana, Greece, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay, and Zaire and had a chapter devoted to a number of East European Countries.

Judicial Interpretation

The European Court and Commission

The European Commission on Human Rights was empowered to receive complaints of violations of the conventions from state parties and from individuals. Since 1 November 1998, when Protocol No. 11 entered into force, a single, full-time European Court of Human Rights came to replace the previous Commission and Court, and individual applicants have been entitled to submit their cases directly to the Court.[41]

The Court and Commission have produced the most extensive and interesting jurisprudence on the derogation clause of the European Convention. Some scholars argue that neither the Human Rights Committee nor the Inter-American Court provide as much substantive jurisprudence as the European jurisprudence[42]. Others claim that this jurisprudence reveals a substantial split between the theoretical discourse of the derogation regime and the reality in which derogation takes place[43].

The Commission and the Court have formally asserted their power to examine the factual legitimacy of any emergency, but they have qualified this assertion by accepting that governments should enjoy an adherent 'margin of appreciation' in deciding whether an emergency meeting the requirements of Article 15 exists, and what powers are needed to deal with it[44].

Considering the existence of an emergency, the *Lawless*[45] case and *Greek*[46] case are two of the most relevant examples.

Lawless case defined public emergency as 'a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question'[47]. The European Court in this case adopted a workable and flexible standard of the concept of public emergency, and it gave the state a considerable 'margin of appreciation' to decide on its circumstances[48]. Although the Court made no mention of the margin of appreciation as a term at the time[49], the doctrine was clearly reflected in its opinion, which contained language referring to the government's discretion on the existence of public emergency[50].

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[41]Articles 24 and 25 (ECHR).

[42]Livingstone (2002) at 43-44

[43]Gross (1998) at 454-455.

[44]E.Ct.H.R. Ser.B, 1960–61, para. 90, p. 82.

[45] *Lawless v. Ireland* (the Lawless case) (No. 1)(Application n° 332/57). Court 1960, p. 1-5 and 7-12.

[46]Greek case Report of the Commission 1969, Year Book of the European Convention on Human Rights at p. 10 and 195

[47]*Lawless v. Ireland* [hereinafter the Lawless Case] report of the European Commission adopted on 19 December 1959, application no. 332/57, para. 90.

[48]The doctrine first appeared in the Cyprus case, *Greece v. United Kingdom*, 1958–1959 Year Book European Convention on Human Rights at p. 174.

[49]See *Lawless case/.*

[50]The Lawless case. (No. 1)(Application n° 332/57). Court 1960, para. 28 p. 56.

This doctrine of margin of appreciation and its wide application in this case and later cases were criticised extensively within the Court and Commission and by interested scholars[51]. By adopting this doctrine, both the Court and the Commission independently undermined their jurisdiction to review and determine the legitimacy of a derogation decision and the resulting measures. Ni Aoláin argues that by applying the doctrine of margin of appreciation, the Court and the Commission were 'sowing the seeds of their own ineffectuality'[52].

In the *Greek* case, the European Commission based its definition of public emergency on its earlier report in *Lawless.* However, the Commission adopted a stricter approach and gave little attention to the margin of appreciation, framing the inquiry instead around objective criteria: Was there a threat? Was it imminent? And was the threat of such an extent that it was likely to create political instability and disorder that would impact the organised life of the community?[53]

These criteria required the state to provide significant evidence (burden of proof) of an imminent exceptional danger that threatened national order and security. The Commission concluded in the end that the evidence provided by the Greek government was not persuasive[54].

While in *Lawless*, derogation was considered necessary to fight an illegal military organisation that resorted to violence against a lawful government, it was clear in the *Greek* case, from the Commission's point of view, that the military regime's sense of urgency had resulted to a large extent from its desire to retain power and block a return to a constitutional democratic order[55].

It has been further noted that the Commission, in reality, granted a very narrow margin of appreciation, if any, to the Greek revolutionary government in what constitutes an emergency and relied instead on the (objective) criteria with no consideration of the government's justification[56]. Gross argues that the Greek case presents 'a positive example of robust international judicial oversight'. He emphasises the fact that this approach has not been adopted in relation to any other assessments of valid derogations and it has been categorised by many as simply a 'response to the anti-democratic character of the Greek government'. The non-democratic nature of the Greek government enabled the Commission to assume a rigid stance, as 'not only would such a decision enjoy moral and political support, but it would be easily distinguishable from any future case involving a democratic regime, thus alleviating member states' fears that a strong decision might be used against them in the future'.

In addition, it is argued that this specific pattern is clearly manifested when dealing with long-term or permanent emergencies[57]:

[51]Gross & Ni Aoláin (2001) at 627-629.
[52]Ni Aoláin (1995) at 110-112.
[53]Report of the Commission, 5 November 1969, YB XII (1969), at 45-71, 72, 76 and 100. .
[54]Greek Case Report of the Commission 1969, YB the European Convention on Human Rights.
[55]Gross (1998) at 460-468.
[56]Gross & Ni Aoláin (2006) at 274.
[57]*Sakik and others v. Turkey*, and in the case of *Aksoy v. Turkey*.

The paradigm is most evidently shown where 'democratic states' introduce temporary legislation limiting rights protection in order to confront a finite crisis but subsequently allow such legislation to become entrenched and survive as an integral component of the state's legal regulation[58].

Here, the boundary between emergency and ordinary law becomes extremely tenuous and the weakness from the accountability standpoint of international judicial accommodation is most evident[59]. Scholars argue that this pattern is most evident in cases related to the conflict in Northern Ireland.

In the case of *Ireland v. United Kingdom*, there was evidence of violations of Article 3 (prohibition of torture and inhuman and degrading treatment), which is non-derogable even in a state of emergency. The decision on this case contributed further to the expansion of the principle of margin of appreciation since the Court declared that:

> "*It falls in the first place to each Contracting State, with its responsibility for 'the life of its nation', to determine whether that life is threatened by a public emergency and if so how far it is necessary to go in attempting to overcome the emergency*[60]*.*"

This doctrine was criticised later by Judge Martens of the European Court of Human Rights in the *Brannigan and McBride v United Kingdom* case, where he argued that such an approach to expanding the state margin of appreciation was inconsistent with the language of the Convention, which spoke of the need for measures to be 'strictly required by the exigencies of the situation'[61].

Further, the case of *Brogan and Others v. United Kingdom*, addressing the case of four persons arrested in Northern Ireland under the provisions of section 12 of PTA 1984, (which provided for special powers of arrest without warrant), Judge Martens stated that while this case was not a derogation case, both the Commission and the Court held that the background circumstances of the case should be taken into account, and that 'the background to the instant case is a situation no one would deny is exceptional'[62].

Similarly, in *Marshall v. United Kingdom*, the Court rejected as inadmissible on the grounds of being manifestly ill-founded, a challenge to the derogation the UK maintained in Northern Ireland. This was despite the fact that the major terrorist organizations in Northern Ireland had agreed a ceasefire for two years

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[58]Gross & Ni Aoláin (2006) at 275 the Prevention of Terrorism (Temporary provisions) Act 1974 is the classic example of this phenomenon.

[59]The consistent approach adopted by the Court and Commission with regard to the frequent derogations by the United Kingdom is a manifested example of these themes; Derogation of 20 August 1971, 1971 YB ECHR 32; Derogation of 23 January 1973, 1973 YB ECHR 24; Derogation of 16 August 1973, 1973 YB ECHR 26; Derogation of 18 December 1978, 1978 YB ECHR 22; Derogation of December 23 1988, 1988 YB ECHR 15; Derogation of 23 March 1989, 1989 YB ECHR 8; and Human Rights Act (Designated Derogation) Order 2001.

[60]*Ireland v. United Kingdom*

[61]*Brannigan and McBride v United Kingdom.*

[62]*Brogan and others v. United Kingdom*.

before the events that occurred in this case. The Court noted that the UK continued to be confronted with terrorist violence[63].

The Human Rights Committee

Under the ICCPR, states parties are required to submit periodic reports to the Human Rights Committee, a body of 18 independent experts, on how they have given effect to the provisions of the Covenant within their territories. The Committee has the authority to question representatives of states parties at public hearings on the content of their reports. There are also provisions allowing for more adversarial proceedings, namely, inter-state complaints (called 'communications') concerning the implementation of the Covenant[64], and complaints guaranteed by the optional protocol ('communications') by individuals concerning violations of rights[65]. Both of these provisions are only applicable where a state party has specifically recognised the competence of the Human Rights Committee to receive such communications.

The Human Rights Committee has been considered to have less to say with regard to what may in practice amount to a state of emergency as it does not play any judicial role[66]. In its early days, the Committee seemed to be 'timid' when questioning non-Western states about their derogation from the Covenant. While this situation changed eventually, some states have always had the chance to escape from the report review without presenting a true picture of their human rights situation, especially if they have not been the focus of NGO activism, have not been the subject of other international procedures, have not filed a brief and abstract report, or have sent a low-level representative to the Committee's meetings[67]. For example, the Committee confessed hopelessness with respect to the situation in Lebanon even though the country had never filed a notice of derogation during the years of civil war and the war with Israel[68].

Other states insist on a facade of normality, aiming to avoid the Committee's scrutiny. Iraq insisted that it was in full compliance with its obligations under the Covenant despite being engaged in a major war with Iran and later in the Gulf. Although there were gross internal violations of human rights, Iraq had not found it necessary to declare a state of emergency[69].

The Human Rights Committee is traditionally considered to have failed to identify states of emergency in certain states and to have frequently declined to endorse the principle of proportionality in its examination of states' practice. Thus, permanent emergencies have managed to escape the net of thorough examination. The Committee has been generally unwilling to hold that the

[63]*Marshall v. United Kingdom.*
[64]Art.40- 41 ICCPR.
[65]The Covenant Optional Protocol to the ICCPR, 1966.
[66]Livingstone (2002). See also Oraa (1992) and Sevensson-McCarthy (1998).
[67]Fitzpatrick (1994) at 82-114.
[68]U.N Doc.CCPR/C/SR. at 442-443 and 446-1983.
[69]Human Rights Committee Report 1987.

situation is unjustified and has posed only awkward questions and offered mild suggestions to the countries involved[70]. For example, with regard to an emergency in Egypt of over twenty years standing, the Committee urged the Egyptian government to consider reviewing the need to maintain this situation[71].

This specific position is evident in the unique case of Syria, where the state of emergency has lasted for over 40 years, and in response to which, in 2001, the Committee issued a recommendation that the emergency to be 'lifted as soon as possible'[72].

Nonetheless, in its revised General Comment 29, the Committee stresses a 'specific regime of safeguards' to guarantee restoring state normalcy[73]. The General Comment specifies primarily that derogating measures must be of 'an exceptional and temporary nature'[74] and that geographical coverage and material scope of the state of emergency must be 'limited to the extent strictly required by the exigencies of the situation'.

With regard to the fundamental non-derogable rights expressly mentioned in Article 4(2), the Committee suggested in Comment 29 that other rights should be upheld during a state of emergency. The fact that some of the provisions of the Covenant have been listed in Article 4 (2), as not being subject to derogation does not mean that other articles may be subjected to derogations at will, even where a threat to the life of the nation exists. The Committee suggested that it would not find that any derogation that was justified by the exigencies of the emergency could excuse the infringement of certain specific rights. These rights include taking hostages, imposing collective punishments through arbitrary deprivation of liberty, and fundamental principles of the right to a fair trial such as the presumption of innocence.

The Inter-American Commission and Court

The Inter-American Commission on Human Rights is empowered to receive complaints of violations of the Convention from states parties and from individuals living in any of the signatory countries. In the case of inter-state complaints they can only be entertained where the states concerned have recognised the competence of the respective body to receive such complaints. Cases can only be referred to the Inter-American Court by the respective Commission or by states parties connected with a case before such Commissions[75]. Under the American system, the Commission and the Court are empowered to transmit their findings directly to the states parties.

The Commission interpreted the concept of 'public emergency that threatens the independence and the Security of the state' in a very similar way

[70]Fitzpatrick (1994); Gross & Ni Aoláin (2006) at 297-304.
[71]CCPR/CO/EGY, para. 6, Concluding Observation of Human Rights Committee: Egypt, November 28 2002.
[72]CCPR/CO/SYR Concluding Observations, Syrian Arab Republic April 2001.
[73]CCPR/C/21/Rev.1/Add.11, 31 August 2001.
[74]A/34/40, Report of the HR Committee (1981), para. 78. considered the state of emergency declared in Chile not to be justified by the circumstances
[75]Articles 44, 45 and61 of the American Convention

to the interpretation given by the other international bodies under the European and the UN systems, despite the different wording[76].

The interpretation of this element has been strongly emphasised through the opinions of the enforcement bodies; furthermore, 'state of emergency' was described by the OAS as 'an institution essentially transitory in nature'[77]. The Court also held this position in an advisory opinion in 1987; it revealed that the extension of a state of emergency as a result of systematic extension or because of the non-existence of any time limit under the Constitution is common under the Inter-American system[78]. The 1978 Report on Paraguay by the ACHR contains a good illustration of this kind of state of emergency. According to the 1978 report of the Inter-American Commission, it was not possible to determine exactly how long the country had been under an emergency regime since the regime seemed to date back to 1929 with only six months of interruption in 1947[79]. In 1986, Amnesty International estimated that the 'the state of siege has been in force almost continuously for over thirty years, although confined since 1978 to Asuncion and the Central department'.[80] The above would seem to indicate that so-called permanent states of emergency are unlawful.

In 1981, the Report on Columbia sharply criticised the past use of the state of emergency by the Colombian authorities. In addition to the fact that the authorities had failed to notify the Secretary General of OAS of the emergency according to Article (27)3, the report reveals that Colombia had been living in a state of emergency since 1948, changing it into an almost permanent system aimed at combating political and common violence in rural areas, and in recent years, in urban parts of the country as well. This systematic maintenance of the state of emergency created a system of exception, the indefinite duration of which affected the institutional functioning of the Colombian state of law[81].

With regard to fundamental non-derogable rights, the Court emphasises that in addition to the rights mentioned in Article 27(2), there is another set of rights that should be considered non-derogable:

> …judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6)[nobody shall be detained for debt] and 25(1)[rights to fair trial], considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees[82].

[76]Oraa (1992) at 14-16.
[77]OAS (1982) The IACHR, at 336-339.
[78]Permanent states of emergency are those which are perpetuated, with or without proclamation, either as a result of de facto systematic extension or because the Constitution has not provided any time limit a priori: Questiaux Report, para 112.
[79]IACHR (1978).
[80]Amnesty International Report 1986, p. 186.
[81]IACHR (1981).
[82]Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987). Requested by the Government of Uruguay at 41(1).

In fact, the Court establishes the principle that all rights under the Convention are considered non-derogable: "[…]all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency[83]."

The Court further emphasised the principle of democratic society and legality and the interrelation between the two principles, holding 'that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law', and that: 'The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system'.

Arab Commission for Rights and Court for Human Rights

The Arab Human Rights Committee carried out its first examination of state reports in 2012-2013, starting with Jordan, Algeria and Bahrain. The concluding remarks of the Committee are now published on its website in Arabic. Civil society organizations are allowed to disseminate these concluding remarks in their countries for public outreach (through different mediums of conventional media and social networks) and follow-up with the national authorities.[84] It is however essential to highlight the limitation offered by the status of the court. The final draft for the statute of the Arab Court of Human Rights has been revised to prevent individuals from applying directly to the Court and gives member states the sole right to file complaints. This undercuts the very reason of setting up the Court. The Arab Human Rights Committee can only receive state reports and issue recommendations. It cannot decide on individual or inter-state complaints, nor interpret the Charter. This limitation cripples the development of human rights as a guarantee in the face of state's power and yet it is limitation renders the regional mechanism almost toothless.

The above studies, treaty provisions, and judicial interpretations all clearly refer to a set of requirements, characteristics, and principles to comply with when a state of emergency is declared and derogation from specific rights is invoked. While there is variation in the scope of non-derogable rights and the approach to a justified state of emergency, all of the attempted interpretations, whether within academia or under judicial application, share the following **Characteristics** and principles:

- In order to declare a state of emergency, the state should prove the existence of an imminent threat to the existence of the nation and include the whole population. Thus, states of emergency of a preventive nature are not lawful.

[83]Habeas Corpus in Emergency Situations.

[84]The Arab League and Human Rights: Challenges Ahead. The International Federation of Human Rights (2013).

- The threat must include the whole population. Although even if it occurs in one part and is proved not to have a direct effect on the rest of the population, it is accepted under the ILA Paris report of 1984[85].
- The declaration of an emergency situation should always be considered a temporary measure.
- Complying with the exceptional nature of derogations the state declaration of an emergency should not take place unless all of the normal measures to deal with the situation have been exhausted.

Principles

State parties to the treaties must act in accordance with a number of principles. The purpose of these principles is to gauge the threat a state is facing in order to minimise the possible danger of abuse of the derogation measures. Serving two different purposes, these principles are classified under two main categories—procedural and substantive principles.

Procedural Principles

The Principle of Notification

The notification principle aims to help provide efficient international supervision by requiring that all states parties subject to the relevant convention be notified of the derogation measures taken. In all four treaties, the derogation clause contains a similar notification requirement. The reason for including this provision is that the derogation from human rights obligations in a state of emergency is a serious measure and a matter of concern for the other states parties[86].

The Principle of Proclamation

The proclamation principle functions internally by making public the government's decision to declare a state of emergency[87]. This declaration is an important decision in the life of the state, and provokes not only derogations from human rights standards but also a certain alteration in the distribution of functions and powers among the different organs of the state. One of the aims of this requirement was to reduce the incidence of *de facto* states of emergency, obliging states to fulfil their obligations under their domestic law.

[85] *Sakik and Others v. Turkey* and case of *Aksoy v. Turkey*.
[86] 10th session, Annexes, agenda item 28, pt.II, Draft Covenant, Report of the Secretary General, A/2929, p. 69, para. 47.
[87] Fitzpatrick (1994) and Gross & Ni Aoláin (2006) at 50; 'proclamation and notification are therefore complementary rather than alternative requirements'.

The requirement of proclamation does appears in the ICCPR and not ECHR and IACHR The absence of such a requirement in the European Convention was considered by the Committee of Experts to be 'a substantial difference' in relation to the Covenant[88]. Despite this, the European Commission in the *Cyprus Case*, after refusing to decide if the lack of notification according to Article 15(3) could attract the sanction of nullity[89].

Substantive Principles

The Principle of Proportionality

This principle can be deemed to constitute a general principle of international law[90]. It was first applied in the customary international law of reprisals and self-defence and human rights is one of the areas in which the principle has found a major application. From an historical point of view, human rights and proportionality have always been linked[91].

According to this principle, the derogation measures, in order to be valid, they must be necessary and proportionate to the gravity of the threat. This principle does not refer only to the extent but also to the period of time during which a derogation measure can be held to be justified.

The Principle of Non-discrimination

This condition is contained in the derogation clause of the ICCPR, the American Convention, and the Arabic CHR, but not in the European Convention. The absence of this condition has no major consequences as the discriminatory application of derogation measures is also forbidden under the European Convention by the operation of the general non-discriminatory provision of Article 14[92].

The Principle of Non-derogability of Human Rights

This is considered to be an essential principle in the regulation of human rights in states of emergency[93]. All of the international treaties that include a

[88]Council of Europe, Problems Arising from the Coexistence of the UN Covenant on Human Rights and the European Convention, report of the Committee of Experts (Strasbourg, 1970), doc. H(70)7.
[89]*Cyprus case*, Report of the Commission (1976), EHRR4 (1979), p. 556.
[90]Delburuck (1984) at 396-400. See also Mossler's in Recueil des Cours: Collected Courses of The Hague Academy of International Law, Volume 140, (1974) at 140-144, 147-148.
[91]Sevensson-McCarthy (1998) at 568-621.
[92]*Ireland v. UK*, Ser. B: Report of the Commission, p. 28; Inter-American Yearbook on Human Rights, 1989, pp. 444-445; In the Nicaragua-Miskitos.
[93]The UK representative in the drafting of the ICCPR at the time, Ms. Bowie, described the principle as 'an essential one', E/CN.4/SR. 127(127Jun 1949), p.7. Mr. Rene Cassin and other representatives made the same point, E/CN. 4/SR. 195 paras. 69 and 90. See also Mr. Oribe

derogation clause contain the vital principle of non-derogability. One of the striking features of the derogation clauses in the three treaties under consideration (ICCPR, ECHR, and IACHR), is that they contain a different list of non-derogable rights. It can be seen that despite agreement on the principle, the problem has been to establish which rights should be considered non-derogable.

Nevertheless, the four lists in the four treaties under consideration contain four common rights that are considered non-derogable in all of the treaties. These rights are: the right to life, the right to be free from torture or other inhuman or degrading treatment or punishment, the right to be free from slavery and servitude, and the principle of non-retroactivity of penal laws. These rights are so fundamental that they are considered to be not only customary international law, but also norms of *ius cogens*. These four rights constitute what has been called the 'irreducible core' of human rights[94].

The protection achieved in the three treaties through the lists of non-derogable rights should be considered. Violations do occur and the international monitoring bodies have consistently denounced gross violations of these rights. Some of the most common violations are: violations to the right to life, such as executions carried out without due process; death resulting from torture or ill-treatment in prison; enforced disappearances; and death resulting from the executive use of force by law enforcement officials[95].

There are two areas in which the urgency to provide some minimum guarantees has been stressed by international monitoring organs and legal experts (especially the European Court and Commission)[96], namely, guarantees against arbitrary detention and guarantees of due process of law. The importance of these minimum guarantees is due to the fact that gross violations of the most fundamental rights (the right to life and freedom from torture) have been possible in part due to the absence of these guarantees[97]. They are so fundamental and closely related to non-derogable rights[98] that it would be difficult to maintain that their derogation could be strictly required by the exigencies of the situation. In addition, the UN General Assembly has adopted by consensus a body of principles for the Protection for all Persons under any Form of Detention or Imprisonment. These principles, which are in line with the minimum standards mentioned before, are to be considered non-derogable in states of emergency.

(Uruguay) and Mr. Malik (Lebanon), paras. 71and 87; See J. Oraa (1992) and A. L. Sevensson-McCarthy (1998).

[94]Oraa (1992) at 96.

[95] Ramcharan (1985); Weissbrodt (1986); Rodley (1987).

[96]*Lawless case*, European Court of Human Rights, Ser. A: Judgment (1 July 1961), para. 28
In the Lawless case and in the *Ireland v. UK* case, it was pointed out that these two articles (Article 5, the right to be free from arbitrary arrest, and Article 6, the right to a fair trial and due process of law) were, after the four derogable rights, the most important rights of the Convention.

[97]Meron (1987) at135.

[98]*Aksoy v. Turkey*, 23 EHRR para. 553 (Court report 1996). See also Amnesty International (1996) Turkey: No Security without Human Rights; AI (1995) Turkey: A Policy of Denial.

The Principle of Consistency with other Obligations in International Law

This principle aims to limit the application of an invoked derogation.[99] The operation of this legal criterion of the validity of the derogation measures can only come after all of the other conditions of the derogation clause have been satisfied.

Conclusion

The international legacy of regional practice offers the regional developing reality of the Arab World a fertile ground to learn from the best practice and build upon. Regional arrangements are also pivotal in the process of diffusing and reinforcing human rights norms and standards in their regions in cooperation with member states.

The derogation system in treaties and most of the studies share the same set of standards regarding the nature of the threat and subsequently the nature of declared emergency (exceptional, imminent threat and temporary state of emergency with aim to restore normalcy), general international legal principles (proportionality and consistency with other obligations under international law) show international concern in the context of states of emergency and applied protection for human rights (notification and proclamation) and a limited number of non-derogable rights.

States exceptional powers in times of crisis are highly complex phenomena, which can be triggered by diverse types of national and international crisis, and thus it is extremely difficult to adopt a coherent international strategy to gauge this issue. In particular, *de facto* and open-ended / permanent emergencies have posed particularly intractable problems in terms of classifications and amenability to measures of special vigilance.

While, by definition, a state of emergency is a temporary legal response to an imminent and grave threat, a perpetual state of emergency is a contradiction in terms. Nonetheless, States' practice proves that a state of emergency sometimes becomes virtually permanent in a number of scenarios: proclaimed emergency for over forty years (Syria), repeatedly renewed (Egypt), or because special measures are entrenched in ordinary laws which survive after the emergency ends (UK).

There has been significant advancement at both the regional and global level to monitor human rights abuses during the enforcement of emergency decree within a declared crisis. However, since the events of 9/11, concerns about mistreatment have amplified, especially related to more ambiguous aspects of the 'war on terror'. More significantly, within the Arabic context, monitoring the states from an exclusively emergency driven pretext is problematic, as the most states due to their colonised history were born into the reality of crisis and conflicts over power. Thus, the use of a scale that measures the intensity of human rights

[99]The application of the principle of consistency by the IACHR in *Nicaragua-Miskiyos*.

abuses as the yardstick to devise measures of international surveillance and control may prove more beneficial. Furthermore, the recent developments in terms of civil unrest, revolutions and counter revolutions, provided for more violations of security resolutions from regional and international actors. These violations posing a security threat, has demonstrated the limitations for international action in the area, given the continuing attachment of governments to notions of national sovereignty, and to adopt a gradualist policy which, whilst not abandoning the search for international solutions, places greater emphasis on strengthening domestic mechanisms of control.

The statute of the Arab Court for Human Rights suffers from a crippling deficiency that needs to be addressed by accepting individual complains against states. This is so that the regional mechanism could resume some effectiveness and perhaps play a positive role in altering a domestic and regional legal culture that regards human rights violations as a guard against abuse of states' powers.

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Data Privacy and Banking Secrecy: Topical Issues in Commonwealth, Continental Europe and International Jurisprudence

By Anatoliy A. Lytvynenko[*]

Common law imposes confidentiality on the relationships between a bank employee and a depositor, debtor or any other client, similarly to many other professional legal relationships that require professional secrecy, such as patient and physician, solicitor and client, priest and penitent, school and student, as well as other interactions featuring bilateral legal relationships. Banks maintain catalogues and registers with records that display accounts and other information regarding clients' financial affairs, which are bound to be disclosed under ordinary circumstances. The common law of the United Kingdom and the United States, as well as some continental law jurisdictions, such as Switzerland, Germany, Austria and Liechtenstein, possesses a certain legacy concerning civil actions against banks for disclosing sensitive personal data, and the ensuing trials allow us a glimpse at some particularly fascinating applications of tort and contract law principles in actions regarding the disclosure of bank records. Both English (in particular, the splendid decision of Tournier v. National Provincial and Union Bank of England), and American courts adjudicated the cases on the foundation of various tort or contract law doctrines, such as a breach of expressed or implied contract, invasion of privacy and breach of confidence or duty, while some decisions were based upon a breach of statutory duty. Thus, it would be intelligible to claim that the secrecy of bank records is far from absolute and may be subjected to various qualifications, both imposed by common law and the legislature: these may involve various derogations arising from societal interest in the detection of crime or verification of public office candidates, revenue commission checks, disclosure to testator's heirs within probate proceedings and others. While these issues of data privacy within banking secrecy have been discussed often within the context of international law, their application in the practice of international human rights courts has seldom been examined.

Keywords: *Bank records; Bank secrecy; Common law; Continental case law; Contract law; Data privacy; Professional confidentiality; Tort law;*

Introduction - Types of Personal Information Relating to Bank Records

The common law and the legislatures of various commonwealth jurisdictions have lodged a burden of confidentiality upon various types of bilateral legal relationships, such as physician and patient, solicitor and client, and priest and penitent.[1] The same could be said concerning the bank (including its employees)

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[1]The priest and penitent privilege means that a clergyman may be exempt from testifying at trial; to be considered privileged, the communications have to be obtained in the course of his professional capacity, and in some separate situations, public interest may override this privilege. See *Keenan v.*

and its clients, in various roles such as a depositor or a debtor. Under ordinary circumstances, the bank has a duty[2] not to divulge bank records to third parties. Bank records are comprised of sensitive personal data that may cause an adverse impact on the plaintiff when disclosed; the list of what information may be defined as "*bank records*" has never been set, but upon respective American case law, I may deduce it would include, savings account books, deposit slips, property lists as well as their respective attributes, income tax returns, gifts, debts, securities and bonds, cancelled checks, honorariums, employment in business entities, interest in real estate, financial interest in partnerships and other legal entities, personal information of creditors or people who sent gifts of a fixed sum of money, financial information of relatives (upon a legislative act provision), federal income tax returns, direct and indirect investments, etc.[3] In continental law countries, the basic banking records contain the name of the holder, the date of commencement and closure of deposit accounts and the date of birth or similar basic personal information of the holder or a person empowered to execute operations by means of the account.[4] A password is also a substantial bank record attribute, as it may preclude the bank from paying off the balance to the plaintiff, unless provided by contract (e.g. the depositor is able to prove his identity by different means).[5]

In various cases involving the disclosure of bank records, US courts repeatedly disposed principles of tort law and the theory of implied contract. Such cases were adjudicated upon a breach of implied contract, which was likely found to be the most favourable claim to maintain the action,[6] or upon tort doctrines, such as breach of confidence, fraud and deceit[7] as well as a breach of trust or duty. In reverse, the plaintiffs occasionally sued banks for non-disclosure of the financial condition of people who had received loans from others; despite courts repeatedly supporting the ruling that banks had no such duty to do this,

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Gigante, 390 N.E. 2d. 1151, 1154 (1979). Most courts and commentators held that there was no priest-penitent privilege originating from common-law; according to some learned scholars, statutes of such nature are very old. See Sippel (1994) at 1131-1133. At the same time, earlier cases involving this privilege featured a stringent common law origin. See Reese (1962) at 57; Whittaker (2000) at 157-161. For a collection of cases, see 71 A.L.R. 3d 794.

[2] It is arguable whether this duty is of statutory or common law. However, for instance, *in Peterson v. Idaho First National Bank,* 367 P.2d. 284, 289-290 (1961*)* and *Djowharzadeh v. City National Bank & Trust Co.,* 646 P2d. 616, 619 (1982) it was found to be of common law.

[3]In *Re Addonizio,* 53 N.J. 107, 248 A.2d 531, 534 (1968)*; County of Nevada v. MacMillen,* 11 Cal. 3d 662, 670 (1974); *Illinois State Employee Assn. v. Walker,* 57 Ill. 2d 512, 516 (19*74); O'Brien v. DiGrazia,* 544 F.2d 543, 545 (1976); *Plante v. Gonzalez,* 575 F2d. 1119, 1122 (1978*); Denoncourt v. Commonwealth State Ethics Commission,* 470 A.2d 945, 946 (1983).

[4]See *II ZR 103/57* (1958) for Germany; *Caisse d'épargne de Bassetcourt c. Choffat,* BGE 89 II 87, 93 (1963*)* for Switzerland.

[5]*See 4 Ob 506/74; HG Vienna 3R 178/73*, Decision of 5 March 1974.

[6]See, for instance, *Peterson v. Idaho First National Bank,* 367 P.2d. 284, 289-290 (1961*); Milohnich v. First National Bank of Miami Springs,* 224 So. 2d 759, 760-761 (1969*); Graney Development Corp. v. Taksen,* 92 Misc. 2d 764, 766-768 (1978); *Suburban Trust Co. v. Waller,* 44 Md. App. 335, 340-343 (1979); *see* clarification in *Indiana National Bank v. Chapman*, 482 N.E. 474, 480 (1985).

[7]*Sparks v. Union Trust Company of Shelby, 124 S.E. 2d 365, 367 (1962); Richfield Bank & Trust Co. v. Sjorgen, 309 Minn.* 362, 367-368 (1976).

the knowledge of bank employees concerning fraud may give rise to an action for breach of duty.[8] Some earlier cases also featured the issue of the *depositor's* property rights in the records,[9] but in later cases the courts sometimes upheld the decree that banking records are the *bank's* property,[10] just as a patient's health records are the hospital's property.[11] The privacy claim, however, wasn't widely accepted among courts, as some chose to follow a well-established concept of a fourfold privacy tort, and adjudicate the case upon another ground, as a breach of confidence.[12] It should be stated, however, that in earlier cases in *Tournier*-like trials in the United States, where a bank employee divulged a plaintiff's bank records to his employer, a privacy claim was found to be non-actionable, as even then most courts accepted the view that the private facts that had been unveiled must be public and not disclosed only to a limited circle of people (e.g. employers or creditors); Had the plaintiffs' counsels stated the claim upon the theory of implied contract, such as in *Peterson v. Idaho First National Bank*, they probably could have succeeded.[13] Unfortunately, quite a few commentators have discussed the application of tort and contract law principles in regard to civil actions involving allegedly unjustified and wrongful disclosure of the plaintiff's bank records to third parties.[14] While some papers on the subject have associated the issue of banking confidentiality to various legislative acts, claiming the scope and derogations of confidence depend entirely upon the state legislation,[15] in this paper I will attempt to develop a stringently case law approach towards the issue.

Brief History

The history of data privacy within the context of banking records is somewhat murky, as there is no uniform source of commentators concerning its routes, origin and duration, just as, for instance, there is no single accepted uniform view on which confidentiality privilege is more longstanding.[16] As Stokes denoted in a paper on banking confidentiality history in England, the subject is "a very partially investigated branch of law." Some claim that the

[8]*Hooper v. Barnett Bank of West Florida,* 454 So. 2d 1253, 1257-1259 (1985).
[9]*Brex v. Smith,*104 N.J. Eq. 386, 390 (1929).
[10]*Leonard v. State of Indiana,* 249 Ind. 361, 365 (1968).
[11]*See In re* The June 1979 *Allegheny County Investigating Grand Jury*, 415 A.2d 73, 76 (1980)
[12]See clarification in *Peterson v. Idaho First National Bank*, 367 P.2d. 284, 289-290 (1961).
[13]367 P.2d. 284, 288-290 (1961)
[14]Some references, however were occasionally made. See Mangan (1981) and Rogovin (1986) at 594-597.
[15]See, for instance, Latimer (1996).
[16]For instance, Bernfeld (1972) at 12-13. claimed that solicitor-client testimonial privilege as a prototype of professional confidence was the most long-standing of all. In a later work, Shuman (1985) at 667-677, found that the privilege of lawyers and clients as well as clergymen is older than the patient-physician privilege, which seems to have emerged only in the late 18 century. What is more obscure, the early English common law does not mention banking confidentiality at all, apart from the cases cited in *Tournier v. National Provincial Bank of England*, [1924] 1 K.B. 461.

history of banking confidentiality may date back to the 16th century.[17] It could be contended that banking confidentiality may have been a matter of tradition, at least for such countries such as Switzerland, which have a very old and elaborate statutory legislation on the subject; some authors claim that data confidence was a bank tradition before being codified;[18] at the same time, it is limited by various federal and Cantonian laws.[19] Swiss case law seems to confirm the existence of such a practice, though it seems that nearly every time Swiss courts faced a banking secrecy breach, it was likely to be a clash between public body duties concerning bankruptcy,[20] revenue,[21] or a probate trial requiring some very specific bank account facts.[22] At the same time, a tax evader holding a public position was unsuccessful in his attempt to forbid a newspaper from disclosing facts regarding his machinations.[23] A breach of economic secrecy, both of ordinary employees (e.g. information regarding their wages and similar data),[24] as well as enterprises,[25] is criminalised in this country. Early on, Switzerland recognised the extension of a statute-originating personal right to privacy in case law,[26] in contrast to Germany, for example, where privacy is a case law-originated right and has no other similar *general* statutory codification except the Constitution.[27] In more recent case law in Switzerland, courts found that an action for unauthorised public disclosure of private facts may be subject to injunctive relief.[28] However, the confidential communications concerning highly sensitive data, such as a criminal conviction, seem to be non-actionable in this country.[29] At the same time, it may the complete opposite in civil suits.[30]

The notion of banking confidentiality in England was seemingly known around a century prior to *Tournier*, being recognised in various dicta and decisions, though less known than the case cited above. One of these cases, *Foster v. Bank of London*, featured the action of a merchant who sued the bank for disclosing his account details to one of his creditors, who then placed money in his account for the sum he was indebted; this financially ruined the merchant, and he won his case.[31] In *Dixon v. Holden*, a merchant was repeatedly intimidated

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[17]See Kelly (1976) at 213-214; De Capitani (1988).
[18]Guex (2000) at 240.
[19]Dumant and Wassmer (1988).
[20]Banque de X. & Cie. c. Etat de Fribourg, BGE 64 I 187, 193-194 (1938).
[21]*Konkursverwaltung der Kredit- und Verwaltungsbank* Zug AG, BGE 86 III 114, 115-118, 120 (1960).
[22]*Caisse d'épargne de Bassetcourt c. Choffat*, BGE 89 II 87, 93-94 (1963).
[23]*Schärer g. N.N.,* BGE 73 IV 27, 31-34 (1947).
[24]*Thurgau g. Dändlicker*, BGE 65 I 47, 49-51 (1938).
[25]*Schweizerische Bundesanwaltschaft g. A*., BGE 98 IV 209, 210 (1972); see also comment on business secrecy crime punishment, Meier (1970) at 19-20.
[26]See *De Vietinghoff c. de Niederhausen,* BGE 44 II 319, 320-321 (1918). Concerning original Swiss statutes, see Muller (2010).
[27]See the discussion on the Swiss and German privacy protection in BGHZ 35, 363, at p. 367 (1961)
[28]*Metzler g. Philanthropische Gesellschaft Union und Mitbeteiligte,* BGE 97 II 97, 100-101; 106-108 (1971).
[29]*Sidler g. Litschgi,* BGE 81 IV 281, 283-285 (1955).
[30]See *Z. g. M und Kantonsgericht von Graubünden*, 80 I 1, 2-3; 5 (1954).
[31]*Foster v Bank of London*, 3 F. & F. 214, 215-217 (1862).

by the creditors of his former business partner to return loans he had never taken; in fact, these loans were taken by his brother, whose firm had gone bankrupt over a decade earlier. The creditors threatened to publish his "debt details" in the local press, and so he sued them for libel, and won.[32] The report does not disclose the source for the account details that the creditors possessed: it might have been the bank, or possibly some registry. Nevertheless, the said institutions were not named as a party in this trial.

The history of banking confidentiality in the United States, initially based in the early-to-mid-20th century upon the *Brex vs. Smith*,[33] *Zimmerman* and *Peterson* , found its beginning quite close to the English boundaries. In the late 1820s, the New York Supreme Court found that an oral disclosure of a holder's conjectural incredibility is actionable, upon the theory of slander.[34] In a 1820s trial in Canada, a shareholder, Baldwin, had maintained twenty shares of capital stock and, aspiring to the position of bank director, desired to inspect bank records in order to gain information regarding the shares of stockholders. The Upper Court of Queen's Bench (per Sherwood, J.) held that a writ of mandamus could be given if Baldwin gave a proper cause of inspection; had he been the director, he would likely have succeeded in his endeavour, but Baldwin lost the case as he neither gave a valid reason for his request, nor was he on the board.[35] In the 1908 trial of *Montgomery v. Ryan*, which was a precursor of *Tournier*, the bank assigned the depositor's overdraft and it's securities to a third party, after disclosing all his bank records to the assignee. The plaintiff put his claim upon a violation of a Canadian act regulating the activity of banks, but failed, as the Court found that the bank exercised its powers properly.[36]

This brings us to *Tournier,* a leading case on banking data privacy. The facts of the case were simple. Tournier, a poor man, received a 10 GBP overdraft from the defendant and negotiated to pay weekly instalments totalling 1 GBP, which he ceased to pay after three payments. He then began temporary employment at a firm named Kenyon & Ko., after which his cheque was obtained by a third party, later revealed to be a bookmaker. The bank manager called the directors of plaintiff's place of employment and told them the plaintiff had some debts and had been involved in betting. Subsequently, Tournier was deemed to be an unreliable person to work with, was fired and filed an action against the bank upon the theories of implied contract and slander, succeeding in both. The Court ascertained that the banker-customer relationship was one of confidentiality and announced a number of facts under which confidentiality may be assumed.[37] US courts have repeatedly cited the *Tournier* case and have mainly followed the English decision.[38]

[32]*Dixon v Holden*, L.R. 6 Eq. 485, 490-492 (1869).
[33]*Brex v. Smith*, 104 N.J. Eq. 386, 390-391 (1928).
[34]*Sewall v. Catlin*, 3 Wend. 291, 294 (1829); *Ostrom v. Calkins*, 5 Wend. 263, 264 (1830).
[35]In re *The Bank of Upper Canada v. Robert Baldwin,* Dra. 55, 58-59 (1829).
[36]16 O.L.R. 75 (1908).
[37]*Tournier v National Provincial Bank of England* [1924] 1 K.B. 461, 462-463; 467-468; 472-474 [per Banks, J.]; 476-477; 480-481 [per Scrutton, J.]; 484-485 [per Atkin, J.].
[38]See *Suburban Trust Co. v. Waller*, 408 A.2d 758, 763-764 (1979).

In Germany, banking secrecy also came under discussion quite early. Before the enactment of the 1947 Constitution, where the right to privacy was treated under a "personal right" provision (*Persönlichkeitrecht*), the general right to privacy had never been codified,[39] though occasionally spotted in case law.[40] Commentators could not come to a conclusion regarding its origins, other than that the German privacy tort claimed to have a case-law nature (somewhat similar to the US) by the Supreme Court.[41] In 1927, the German Supreme Court, known then as the *Reichsgericht* faced a cunning suit: a merchant won a suit against a credit history reporting agency, filed for disclosing facts of his criminal past despite the fact that he was pardoned two decades earlier, on the grounds of a "breach of good morals," which probably would be tantamount to a US tort of mental anguish or outrage.[42] In a 1950s trial, a Berlin owner of a local bank found himself under severe debt, and reached an agreement with fellow banks to credit him in order to avert bankruptcy. In the meantime, a local paper published that he was about to be bankrupt. The plaintiff sued several defendant parties for a bank secrecy breach, but failed, as the Federal Supreme Court found that the publication didn't cause him to be ruined; at the time of the publication, he was, in fact, bankrupt or very close to bankruptcy.[43]

Derogations

The rationale of banking confidentiality is quite apparent and is based upon mutual trust, which is recognised both in Anglo-Saxon and Continental case law: the client has a duty to furnish his personal data, which may be of quite a sensitive nature, and at the same time the bank has a duty not to divulge this information, other than in a number of very limited situations. If bank confidentiality would not be an inherent feature of the interaction between bank

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[39]In most German privacy cases, the plaintiffs base their claims upon §823.1 CC (protection of liberty, property, freedom and collateral rights, but the right to privacy had never been actually specified in the code provision), as well as §12 BGB in some earlier cases (copyright protection), see e.g. *Graf Zeppelin,* RGZ 74, 308; case No. 688/09 (1910) at 310.

[40]The German privacy cases are not much newer than the US ones. See: *Fraulein G. Sch*. case, RG vom. 29 Nov. 1898, D. 4098/98 VIII 8145 [unauthorised commercial disposal of photo of a woman in a swimming pool, defamation]; *Otto von Bismarck case*, VI. 259/99; RGZ 45, 170, at p. 172-173 (1899) [unauthorised photo of von Bismarck corpse, trespass]; RGZ 51, 369; No. IV 50/02, at. p. 373; 380-et seq. (1902) [blacklisting of workmen, moral offence, held non-actionable on various grounds]; *Nietzsche case,* RGZ 69, 401; 638/07 (1908) [publication of private letters, copyright]; *Graf Zeppelin,* RGZ 74, 308; case No. 688/09, at. p. 310-311 (1910) [appropriation of Count Zeppelin's name and likeness to advertise tobacco products, copyright]; *Dierig*, RGZ 91, 350, 360 etc. (1917) [alleged violation of the reputation of a factory owned by the plaintiff's father by historical facts quoted in a scientific paper, found non-actionable as the facts were proven to have originated from archives]. For an early discussion of some German cases concerning photography, see Kohler (1903) at 28-44.

[41]See Scheyhing (1960) at 508-513..

[42]IV 489/26, RGZ 115, 416, at p. 417-419 (1927).

[43]BGH, 20.12.1955 – I ZR 171/55, para. 4-14; 32-33 (1955).

and client, the public would have no confidence in the banks.[44] The Swiss Federal Tribunal, adjudicating a case where a bank employee was accused of stealing a magnetic tape with a computer program from the bank, said:

> "*To a large extent, relationships between banks and their customers depend on their confidence in the bank's discretion with respect to matters relating to client's private sphere of life. If there is no guarantee that such facts, once revealed or learned, will remain secret; then the client's confidence in the bank would disappear, and hence, one of the essential conditions for a viable banking business would collapse.*"[45]

Thus, the exceptions are deemed to be few and justified upon appropriate case law. These exceptions were first discussed in the case of *Tournier*; during the discussions of this case, the court determined the four instances in which it would be legal to divulge bank clients' personal data: a) when the revelation is in compliance with the law; b) when there is overriding public interest (e.g. prevention of crime); c) when the disclosure is in the interests of the bank (primarily in trials when the bank is named as a party); d) when the client consents to it.[46] These principles were firmly followed in England, even if not cited directly. In *Williams v Summersfield,* the accused sued a constable for ordering the inspection of their bank accounts in order to search for further evidence; this was done in compliance with the 1879 Evidence Act provision. The Court found that the order was made by a party of the proceedings and that further evidence, including that obtained by inspection of the books, was justifiably required.[47]

In a similar case in 1980, a police officer applied for an order to inspect a suspect's bank account "book", but the information he needed as evidence was stored on microfilm, rather than on paper. The High Court backed the lower one's decision, confirming that the police officer was a party of duly commenced proceedings and without a court order to disclose the records, it would be impossible to specify the benefactors of cheques paid from the accused's account and thus detect his fraudulent behaviour. The spirit of the aforesaid Evidence Act provision was successfully adapted to modern-day techniques: "*A book is a word which is used in many contexts.*"[48] The prevention of crime, in particular financial crime, is often a reasonable "excuse" for derogating bank confidentiality. For instance, in the early 90s, the Italian Constitutional Court ruled that the provisions of the 1972 Presidential Decree, concerning lifting bank secrecy in respect to tax evasion and financial crime investigation upon the request of prosecution and law enforcement bodies, are constitutional.[49]

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[44]In fact, the duty of a customer to furnish correct personal information is not ephemeral, otherwise he may be charged for fraud, see *Djowharzadeh v. City Nat'l Bank & Trust Co. of Norman*, 646 P. 2d 616, 619 (1982).
[45]*C c. Ministère public du canton de Vaud*, BGE 111 IV 74, 80 (1985) Translated from French).
[46][1924] 1 K.B. 461, 473.
[47][1974] 2 Q.B. 512, 516-519.
[48]*Barker v Wilson* [1980] Q.B. 884, 886-887.
[49]La Corte Constituzionale, Sent.No. 51 del. 1992.

Despite the fact that a number of US state courts appraised and applied the principles of *Tournier*, there were contrary views on the issue of derogation. Indeed, in *Suburban Trust Co. v Waller*, the respondent applied for an income tax refund check to be cashed, but was told his balance was not enough to cover it, so he took a friend who required a similar check cashed and went to the Treasury Department, where they received the money with bills having sequential numbers and deposited them to the bank. An inexperienced employee believed the bills might be suspicious and informed a security officer, who made a series of inquiries and was informed by a police chief that there had been a recent robbery, describing the main suspects; the security officer believed that Waller and his friend were these suspects and subsequently revealed all of Waller's bank records to the police chief. The victim identified Waller as the perpetrator from a photograph, but after Waller was captured and put on trial, the victim retracted his identification and Waller was discharged. After that, he sued the bank for privacy invasion and breach of contract. While considering the issue of bank-depositor relationship, the Court took *Tournier* into account and upheld that secrecy is an implied *contractual* duty of non-disclosure, but rejected the wide range of derogations, stating:

> "*We do [reject the derogations set in Tournier decision] because we believe that those two authorities confer upon the bank entirely too much discretion. Were we to follow Tournier, or 10 Am. Jur. 2d. Banks para. 332 [the annotation], we would permit a bank to decide what is or is not the best interest of the bank to disclose*."

The Court also emphasised that Maryland's legislature enacted provisions concerning banking secrecy which were far more strict than the "proposed" English ones, namely a) upon the customer's consent; b) upon a court order, subpoena or other warrant. Waller won his case upon the theory of implied contract.[50]

The derogations of banking confidentiality in other situations could are varied. For instance, in Switzerland the law applies different boundaries of secrecy and the case law ascertains that bank confidentiality may be breached in situations of cooperation between Switzerland and other countries such as Germany[51], England[52], or the United States,[53] in order to provide legal assistance in criminal matters (e.g. tax evasion or financial frauds). While the "limits of secrecy" in civil and criminal procedure in Switzerland are beyond the scope of this paper, it is quite apparent that a testimonial privilege may be overrun by a court order when an offense is suspected.[54] Swiss case law holds that bank secrecy

[50] 408 A.2d 758, 762-765 (1979).

[51] *X. g. Eidgenössische Bankenkommission*, BGE 125 II 83, 84-85 (1998).

[52] *E. g. X Bank Corp.,* BGE 120 II 118, 119; 121-123 (1994).

[53] *X. und Y-Bank g. Eidgenössische Steu*erverwaltung, 101 Ib 160, 163 (1975) [note the 1973 Treaty].

[54] *X. g. Staatsanwaltschaft und Kantonsgerichtsausschuss von Graubünden,* BGE 91 I 200, 204-207 (1965).

cannot be used as a defence to seal assets or other bank documents from creditors.[55]

In Germany, bank secrecy must be unveiled in the course of preliminary investigations against a bank customer or employee; the bank is under obligation to produce all necessary evidence concerning the investigation. It is emphasised that not all documents are to be disclosed, but only ones relevant to the investigation.[56] In several continental jurisdictions, such as Germany,[57] Switzerland,[58] Austria[59] and Liechtenstein,[60] the disclosure of a deceased testator's account records to heirs is allowed within a probate proceeding; it does not constitute a bank secrecy violation and all heirs are entitled to view the necessary records; other heirs cannot be deprived of inspecting the testator's records. In Austria, a minor may be obliged to divulge his bank account details to a foster parent under certain circumstances, or disclose it voluntarily, but the bank or a credit reporting agency is not compelled to reveal the information to a foster parent.[61]

In a 1970s US trial, several policemen, who were suspended for refusing to provide information regarding their financial assets, brought an action against the commissioner. The Court deemed that it was not a public disclosure and that it is in society's best interest to maintain honest public servants, finding that the questionnaire regarding the policemen's financial assets did not violate their right to privacy.[62] In the 1970s and 80s, United States courts repeatedly affirmed the constitutionality of statutes requiring holders of public office to disclose their financial records, and frequently also the records of their spouses.[63] Sometimes, the legislature's demands were found to be outrageous: in *Denoncourt*, several school directors filed a class action against the Pennsylvania Ethics Commission. Based upon the abovementioned 1978 act, the directors, apart from having an obligation to disclose a variety of personal financial records, were required to provide the records concerning immediate relatives; moreover, one of the act's sections criminalised their failure to comply with the request, imposing criminal liability for not fulfilling it, not for unwillingness or sabotage. The plaintiffs alleged that both prosecution for nonfulfillment and the request to disclose family members' financial records were unconstitutional. The Court found that since criminal liability may arise from actions with which the public official may not comply, this violates due process. The Court also determined that privacy rights are to be carefully balanced against state interests, and though it may be reasonable to demand the disclosure of

[55] *La Cause* Dubois, BGE 85 III 118, 120 (1959).
[56] See LG Hamburg, Beschluß von 10.01.1978, (86a) Qs 68/77; NJW 1978, 958, at p. 958-959.
[57] BGH 107, 104; XI ZR 91/88, para. 12-15 (1989).
[58] *Caisse d'épargne de Bassetcourt c. Choffat*, BGE 89 II 87, 93 (1963).
[59] 8 Ob 167/67, Decision of June 27, 1967; 4 Ob 506/74; HG Vienna 3R 178/73, Decision of 5 March 1974; OGH 4 Ob 522/84; Decision of 27 February 1985.
[60] F.L. OGH 16.08.1993; 4C 170/32-23, 1 Bosch 58, at p. 62-63; 65-66.
[61] 8Ob 71/70; LGZ Vienna 44R 542/69, Decision of April 7, 1970.
[62] *O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1976).
[63] *Kenny v. Byrne*, 365 A.2d 211, 216-218 (1976).

an official's financial affairs, this is not the case for family members, whose privacy interests may be impaired.[64]

In several cases, the United States courts held that banks have an obligation to disclose the financial condition of the second party transaction, in cases where there is clear evidence that the said party may be involved in swindling, is in debt or bankrupt.[65] A subpoena could also be issued to produce banking records.[66] For instance, in the *Addonizzio* trial, a town's mayor accused of various financial machinations appealed against a subpoena compelling him to surrender all of his bank records and defended himself on basis of the 4th Amendment. Interestingly, he succeeded not on this basis, but based on the fact that the bank records were the property of the *bank*, not *his own*; the Court emphasised that the plaintiff would not have been able to successfully challenge this subpoena had it been addressed to the *bank*, rather than *him personally.*[67] A subpoena requiring the bank to produce bank records must be issued in the course of legal proceedings, otherwise it may be deemed invalid.[68] Some American courts held that the customer's *debts to the bank* cannot possess the label of "banking secret", as the bank acts as a lender and does not possess a duty to keep the debt records as secret. In such cases, the information may be divulged only to authorised individuals, and thus the disclosure of debt facts is non-actionable upon the theory of implied contract, but may be actionable upon privacy invasion if it is disclosed in public.[69] A disclosure of banking records, especially records that feature loan facts to a law enforcement officer, also does not constitute a breach of an implied contract.[70]

Tort and Contract Law Principles in Civil Actions Involving the Disclosure of Bank Records

In various trials occurring in commonwealth states concerning the disclosure of bank records of depositors, the courts applied tort and contract law principles, and occasionally, issues of property rights. For instance, in one of the earliest cases on the subjects in the United States, *Brex v. Smith*, a public prosecutor demanded that the bank accounts of all policemen Newark Police Department be disclosed without any proceedings, stating that the court of equity cannot preclude him of doing this. The Court confirmed his statement, adding that it was correct except in situations where public authorities are acting without authority and property rights are involved; there was no criminal proceeding, and concerning the property rights, the court said: "*There is an implied obligation, as I [Church, V.C.] see it, on the bank, to keep these [records] from*

[64]*Denoncourt v. Commonwealth State Ethics Commission*, 479 A.2d 945, 948-950 (1983).
[65]See e.g. *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W. 2d 648, 651 (1976).
[66]See fn. 3 supra; for some more contemporary cases. See, e.g. *Twiss v. State Dept. of Treasury*, 124 N.J. 461, 474-*475 (1991); Hirl ex. rel. Hirl v. Bank of America, 952 A.2d 479, 483-484 (2008).*
[67]In *Re Addonizio*, 53 N.J. 107, 131-132 (1968).
[68]*Commonwealth v. DeJohn,* 486 Pa. 32, 40-41; 47-49 (1979).
[69]*Graney Development Corp. v. Taksen*, 92 Misc. 2d. 764, 767-769 (1978).
[70]*Indiana National Bank v. Chapman*, 482 N.E.2d. 474, 480-482 (1985).

scrutiny until compelled by a court of competent jurisdiction to do otherwise. The information contained in the records is certainly a property right.". Thus, the court enjoined him, inter alia, upon the property right of the bank in the customer records.[71] In a federal trial of *Zimmerman v. Wilson*, a husband and a wife filed an action to restrain revenue officers from examining the bank accounts of plaintiffs, and the Court found for the plaintiffs, based upon the constitutional provisions of unreasonable search and seizure.[72] While the claim for an invasion of privacy may be logical, it is not very successful at trials in the United States: the matter is that courts usually recognise the scope of a privacy invasion upon a fourfold classification. The disclosure of banking records does not fall under this classification, namely public disclosure of private facts: it cannot be claimed that disclosure to a creditor, or, more frequently, an employer, is public. The case of *Peterson v. Idaho National Bank* illustrates this principle precisely. The plaintiff was an employee at Family Finance Corp. in Lewiston, Idaho. One day in autumn 1959, the manager of the company in Denver, Colorado, contacted the bank and suggested one of the employees, Peterson, may be discreditable and harmful to the enterprise. The bank manager sent the manager a confidential letter confirming Peterson had severe financial problems and then revealed additional information regarding his accounts, unbeknownst to the plaintiff. The Idaho Supreme Court said the state had neither statutory regulation of the subject, nor a common law right to privacy recognised. The plaintiff did not contend that the disclosure was public, although he filed the claim upon a violation of privacy. The Court cited a number of *Tournier*-like trials,[73] where no liability was imposed upon the defendant under a privacy claim, in situations where the defendant privately disclosed one's debts or financial conditions to an employer. The Court held that the action may be maintained upon a breach of implied contract, citing *Tournier,* as well as earlier US cases on the subject, such as *Zimmerman.*[74] In the later trial of *Chapman*, the plaintiff filed a multi-claim action for disclosing bank records concerning a loan to a police sergeant, including one count of privacy invasion; the Court examined various types of "contemporary" privacy violation, such as eavesdropping, but found that bank records disclosure was non-actionable as it lacked the component of publicity.[75]

A *breach of implied contract* seems to be the most suitable basis from all of the theories upon which recovery may be granted. The gist of this theory is that banks possess a duty not disclose the records of their customers under ordinary circumstances; and so, when the client commences relationships with the bank, there exists an implied contractual obligation of non-disclosure of the records that are related to depositors. Such an approach was upheld in various well-known American trials, such as *Milohnich*[76] *Sjogren,*[77] *Waller*[78] and others.

[71] *Brex v. Smith*, 146 A. 34; 104 N.J. Eq. 386, 390-392 (1928).
[72] *Zimmerman v. Wilson*, 81 F.2d 847, 849 (1937).
[73] See e.g. *Levis v. Physicians etc. Bureau*, 27 Wash. 2d 267, 271-273 (1947).
[74] 367 P.2d 284, 288-290 (1961).
[75] *Indiana National Bank v. Chapman*, 482 N.E.2d. 474, 477-479 (1985).
[76] 224 So. 2d 759, 761 (1969).

The implied contractual duty was also recognised in earlier dicta.[79] This duty is not applicable in cases when the plaintiff is not just a customer, but also a debtor: in the 1970s trial of *Taksen*, the plaintiff's debt details were revealed to another bank, and he filed a multi-claim action against the bank; the Court found the count for an implied contract breach non-actionable, as a debtor cannot expect to have his debts kept in confidence, and these may be divulged in a limited circle of instances.[80]

Sometimes, a theory of breach of confidence is applied. The gist of the tort is a disclosure of confidential information acquired within the relationship of the parties, regardless of its content; the same may be applied to bank secrecy. In the case of *Djowharzadeh*, the plaintiff decided to take a loan from a bank in order to purchase a duplex house. This information was disclosed to both wives of the bank's managers by a loan officer, and both women decided to overrun the plaintiff and buy the premises for themselves. Apparently the plaintiff knew nothing about these developments, though he was refused the loan. During the trial, the bank employees did not deny they had revealed the records and contended they had no legal duty to keep the information secret; but the Court ruled that there *was* a common law-originating duty of confidence, stating that it originated from reciprocal duties – to furnish the personal data accurately from the *customer*, and to maintain it properly from the *bank*. Thus, the Court held the claim to be actionable.[81]

On some occasions, actions for *fraud* and *deceit* may be filed for non-disclosure of a transaction party, which may be bankrupt or have substantial financial difficulties. In the case of *Sjogren*, respondents negotiated to purchase five dozen purification units from an enterprise entitled National Pollution Eliminators, Inc.; they decided to take a 44,000 dollar loan from Richfield Bank & Trust Co., with a 90-day promissory note and some real estate, including the purification machinery, as securities. Soon the NPE was found to be insolvent and unable to supply the machinery, though the bank officer did not disclose this fact prior to the loan deal. The Court admitted that despite the general duty not to disclose the depositor's account details, it was the duty of the bank officer to report his knowledge of fraudulent activities or "irretrievable insolvency". the Court added that not every insolvency instance is fraud, as the machinery could have been purchased on credit, but this was not the case, as there was no reasonable expectation to fulfil the contract obligations. The loan officer knew that NPE actually was deeply insolvent, and the court affirmed the lower court's order for the plaintiff.[82]

In a similar case of *Nie*, an employee of an agricultural enterprise dealing with pig feeding received a substantial inheritance and was advised to invest in the said company and another one, both owned by his employer, Dunnegan. He

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[77]309 Minn. 362; 244 N.W. 2d 648, 651 (1976).
[78]44 Md. 335; 408 A. 2d. 758, 762-765 (1979).
[79]*United* States of America v. First National Bank of Mobile, 67 F. Supp. 616, 624 (1947).
[80]Graney Dev. Corp. v. Taksen, 92 Misc. 2d. 764, 767-769 (1978).
[81]*Djowharzadeh v. City National Bank & Trust C*o., 646 P2d. 616, 619-620 (1982).
[82]*Richfield Bank & Trust Co. v. Sjogren*, 244 N.W. 2d 648; 309 Minn. 362, 367-369 (1976).

accepted this advice and took his boss and family to the bank to check the financial condition of both businesses. The bank did not reveal that both enterprises had large debts and overdrafts, though they were up-to-date on their loan payment. After a certain time period the plaintiff learned about the enterprises' solvency problems, and even took loans and went into debt in order to try and save the companies. Finally, he sued the bank for fraud for not revealing all the relevant bank records. The Court found that the loan officers who advised the plaintiff were in the hog business themselves and were familiar not only with Dunnegan and his enterprises, but with their actual financial condition. The court found the nondisclosure to be actionable and remanded the case, as at the time the loans were current and, as far as the bank knew, the companies were making money and represented a good investment.[83] Not all US courts support this position. In *Sparks*, for example, the plaintiff decided to take up a loan to construct a building, expected to be leased to one Williams. The bank agent knew Williams had been insolvent, but concealed this, presenting him as wealthy and credible. A year later Williams' assets were seized and thus he was unable to pay the rent. Sparks sued the bank for over a thousand dollars in damages, but the Court found that the bank had no duty of obligation to disclose Williams' state of financial affairs, as it was required to maintain secrecy.[84]

International Law Concerns

The issue of banking secrecy has never received a concordant legacy in international law. The primary legacy could be observed in case law originating from Switzerland's bilateral covenants. For instance, in 1951 Switzerland bargained a treaty with the United States to avoid double taxation, and they agreed, inter alia, to exchange data under request regarding economic crime investigation; in order to obtain information, the American authority had to contact the Swiss authority and a court order would enable dataflow to be transported to the United States.[85] In late 1968, the United States applied to inspect records concerning several Zurich bank employees, their comrade in Washington, and an another US citizen (not named in the case report), who repeatedly acted fraudulently, forging document for over three million dollars and depositing embezzled funds in a Swiss Bank. The Zurich district attorney's office granted American authorities access to the criminal records upon their request, but the plaintiffs appealed. The Swiss Federal tribunal found the order to be legitimate and recognised the United States as "an injured party" as well as ascertaining that the American authority should make a formal declaration that the data revealed must not be afterwards disposed for fiscal purposes.[86] In November 1972, the US Internal Revenue Service (hereinafter – IRS) asked the

[83]*Nie v. Galena State Bank & Trust Co.,* 387 N.W. 2d 373, 375-376 (1986).
[84]*Sparks v. Union Trust Co. of Shelby*, 256 N.C. 478, 480-483 (1962).
[85]Dunant and Wassmer (1988) at 554-556.
[86]*N. g. Vereinigte Staaten von Amerika*, Bezirksanwaltschaft Zürich und Staatsanwaltschaft des Kantons Zürich, BGE 95 I 439, 440-442; 447-448 (1969).

Federal Tax Administration of Switzerland not only for the bank records, but to produce witness testimony concerning tax fraud cases, as well. Two Swiss banks were compelled to divulge the said documents; their prior administrative complaints were rejected. On appeal, the Swiss Federal Tribunal held that the bilateral agreement was bound to written reports and didn't presuppose any actual judicial assistance; nor was the 1973 treaty any help: despite the fact that Switzerland and the United States agreed to exchange data concerning fiscal crimes, including testimony, this was mainly regarding high-level criminals, and as the said treaty was not in force by 1975, the appeal was allowed.[87]

In fact, Switzerland has negotiated around a dozen such treaties with other countries.[88] However, the existing case law shows that banking data were not once transmitted upon bilateral agreements to other countries.[89] Switzerland's international agreements were also the cause behind various data privacy-related trials. For instance, one bank employee from Zurich opened a deposit account for an Englishman, who lodged over 8 Million CHF by portions in 1987; upon a request for assistance, the bank launched an investigation and found the money deposited was, in fact, laundered money originating in a gold heist. The employee was immediately fired and lodged three actions against the bank, namely 1) to return him to his place of employment; 2) to recover damages for his discharge; 3) to allow him access to his personal file and two reports from an English detective agency so as to gain necessary evidence. All trials were lost and he appealed to the federal court. The Tribunal dismissed his appeal, as 1) sufficient testimony was introduced that the information he sought was not in his personal file; 2) the right to access is granted to ascertain whether the records contain a potential violation of his "personal rights", e.g. the records are false or not related to his employment, and so these may be used as evidence for trial. However, he didn't apply for a court order to produce the documents in order to fulfil this specific purpose; in fact, the appellate court also dismissed his access-to-record claim on the basis that he hadn't stated a justifiable cause for obtaining the records after the termination of his contract. This was not contested before the Tribunal.[90] It should be noted that regardless of being a "code law" legal system, Swiss law has a large case law legacy regarding access to personal files involving a wide variety of situations, such as disclosure of one's deportation,[91] public office employment history and related subjects,[92] police files[93] and much more.

While issues of data privacy within banking secrecy have been discussed often within the context of international law, they are seldom mentioned in the practice of international human rights courts. On this matter, the most comprehensible and systemised practice is elaborated by the European Court of

[87] *X. und Y-Bank g. Eidgenössische Steuerverwaltung*, 101 Ib 160, 163-165 (1975).
[88] Dunant and Wassmer (1988) at 552.
[89] *X. g. Eidgenössische Bank*enkommission, BGE 125 II 83, 84-85 (1998).
[90] *E. g. X Bank Corp.,* BGE 120 II 118, 119; 121-123 (1994).
[91] *X. g. den Regierungsrat des Kantons Y*, BGE 95 I 103, 106-111 (1969).
[92] *Demont et al. c. Conseil d'Etat du canton de Genève*, BGE 100 Ia 97, 102-103; 106 (1974).
[93] *M. g. Regierungsrat des Kantons Zürich*, BGE 113 Ia 1, 8-9 (1987).

Human Rights under Art. 8 of the Convention, upon which all the relevant case law is based.[94] The European Court has been required to address issues of data privacy since the 1970s, though such cases are not frequent: for instance, some entries featured personal records retention,[95] intelligence records discovery,[96] and several cases discussed access to medical records.[97] However, banking secrecy violation is quite a novel issue within international law. To fall within the scope of "private and family life", the Court has to affirm cognisance over a case under a claim for a privacy violation, such as the matter of medical records in the trial of *Gaskin,*[98] or with storing and maintaining criminal records by a national intelligence body, as in *Rotaru,*[99] or by the penitentiary authorities, as in the relatively recent trial of *Khehili.*[100]

The 2010s featured two trials on banking confidentiality. In *B.F.B. Villa-Nova v. Portugal*, the plaintiff was a possessor of a local law firm suspected of tax evasion, which allegedly occurred around 2006. The revenue office requested that the plaintiff produce her banking records. She refused, relying on bank secrecy. The revenue office then passed the matter to the prosecutor's office, who applied for an order at a local appellate court, which ruled that the secrecy should be lifted. The plaintiff was not allowed to appeal and thus lodged a lawsuit to the ECtHR. The Court recognised jurisdiction over a case on bank secrecy breach under Art. 8 of the Convention, and found that despite the fact that the ruling had a legitimate basis and was in compliance with Portuguese statutory and case law, the plaintiff wasn't notified regarding the trial and was thus not present at the trial, was not allowed to defend herself, and could not therefore appeal to the Supreme Court in order to reverse the appellate court judgment

[94]The first privacy trial of the European Court commenced in 1971 (*Klass et al. v. The Republic of Germany*, 2 EHRR 214), and decided in 1978. However, before 1978 there were instances where Art. 8(1) of the ECHR was disposed as a provision on the basis of which courts granted injunctive relief or damages. E.g. in Italy, in *Celentano, Petacci e al. c. Palacci*, Sent. 20 Apr. 1963, n. 990; 86 Il. Foro 877, 880; the relatives of Clarice Petacci, a lover of Benito Mussolini, sued an establishment for depicting details of her personality and life, being portrayed as impious in the 1930-40s in a book, and the Italian Supreme Court of Cassation (Corte Suprema Corte di Cassazione), acknowledging that despite the fact that Italian case law and doctrine did not recognise a common law right of privacy, the right to privacy must be recognised on basis of Art. 8(1) of the Convention (though not solely on this basis). Furthermore, this sort of privacy was "relational", since C. Petacci hadn't survived to the date of trial, as she was executed with the Italian dictator in 1945. A similar conclusion can be found in a subsequent Italian case before the same court, *Rossi e al. c. Soraya Esfandiari*, Sent. 27 Mar. 1975, n. 2129; 99 Il. Foro 2896, 2905. In a pioneering case, *Tirreno Asso Film c. Caruso*, Sent. 22 Dec. 1956 n. 4487, 80 Il. Foro 4, at p. 7-10, an Italian singer's life story was depicted in a film. The artist sued but failed as the Court held that there is no general right to privacy in Italy, apart from the protection of one's name and/or image, but not a life story. Swiss courts also cited Art. 8(1) of the Convention as a provision protecting data privacy: *M. g. Regierungsrat des Kantons Zür*ich, BGE 113 Ia 1, 7 (1987), but not as a sole source of law, and the European Court already had case law on the subject by the mid-80s.

[95]*Leander v. Sweden* [1987] 9 EHRR 433. Compare, e.g. with Laird v. Tatum, 408 U.S. 1 (1972).

[96]*Szulc v. Poland*, [2013] 57 EHRR 5, 163-167 (see facts on pages cited).

[97]See for instance, *Odievre v. France*, [2003] F.C.R. 621.

[98]*Gaskin v. United Kingdom*, [1989] 12 EHRR 36.

[99]See *Rotaru v. Romania*, [2000] ECHR 92, para. 43.

[100]See *Khehili v. Switzerland*, [2011] ECHR 195, para. 15 et seq. (reported in French as *Affaire Khelili c. Suisse).*

(which was, in fact, contrary to Portuguese case law); As a result, the Court found for the plaintiff.[101] Another trial, *G.S.B. v Switzerland*, arose from US-Swiss cooperation in the field of financial frauds. In 2009, the Internal Revenue Service of the United States suspected that a Swiss bank, UBS, assisted US taxpayers in tax evasion. The US and Swiss authorities agreed to cooperate and thus lodged a conjoint assistance request to the Federal Tax Administration to make an order to compel UBS bank to disclose over four thousand accounts, but the bank appealed to the Federal Administrative Court and the order was quashed; The US and Swiss authorities then negotiated another assistance protocol, which was later found to be valid by the same court. The plaintiff was one of the unfortunate people whose bank records were disclosed and he lodged a lawsuit to the Federal Administrative Court; after losing the trial,[102] the plaintiff appealed to the Federal Tribunal, with no success. To wit, before the trial at Strasbourg, the plaintiff hadn't been accused of a single financial offence. Though the Court affirmed cognisance over matters concerning bank secrecy to be related to Art. 8, it found that such privacy interference was justified for the state's well-being and to eliminate the risk of jeopardizing the bank from being bound to survive, thus finding there was no violation of his right to privacy.[103]

Conclusions

Data privacy in relation to banking confidentiality is one of the most obscure types of personal information confidentiality, owing to its traditionalistic character regarding various professional bilateral legal relationships. The duty posed on the banks gives a right of action for a breach of implied contract, or confidence, or occasionally gives redress upon either regarding other tort doctrines, or civil code, or other statutory remedies. The history of banking confidentiality has been scantly researched and there is no uniform body of knowledge concerning its traditional, case law or statutory origins, which has seemingly developed over the last two centuries. Bank secrecy has various derogations, which are mostly similar in Anglo-Saxon and Continental law; despite this, there certainly are a number of unique characteristics which are relevant only to certain jurisdictions. The issues of data privacy within bank secrecy has received certain reflection in international law, partially deriving from human rights courts, and, to some extent, in national court trials concerning bilateral covenants intended to avoid double taxation, such as the agreements concluded between Switzerland and other state-parties. The prospective trials in international human rights courts raise a multitude of issues concerning derogations of secrecy in various instances, with a wide variety of trials to be examined by judges. Thus, comparative research on bank secrecy in the context of recent developments of right to privacy in both Commonwealth states and in Continental Europe is a quite lacking, and extremely needed.

[101] *B.F.B. Villa-Nova v. Portugal* [2015] ECHR 1049.
[102] *X. und Y. g. Eidgenössische Steuerverwaltung*, BGE 137 II 128, 133-135 (2010).
[103] *GSB v. Switzerland*, [2015] ECHR 1122, para. 75-98

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Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland

By Matteo Mastracci[*]

In Poland, after the Parliamentary election of 2015, the executive propelled a series of interlock reforms of the judicial bodies. In the first place, the way forward was marked by a compound diatribe concerning the Constitutional Tribunal, the essence of the dispute was about the mandate's legitimacy of three sitting judges after the Court's reinterpretation of the K 34/15 ruling that ended up on 2 December by the election of five new judges appointed ex novo by the ruling party. Afterwards, the attention shifted towards the rethinking of the National Council of Judiciary (KRS), asserting, firstly, the unconstitutionality of its statute and, subsequently, planning a new method of appointment for the judicial members. Ultimately, the spotlight turned in the direction of the Supreme Courts judges where the most spectacular sweep was the provision aimed at lowering the retirement age for the sitting judges on a scheme similar to the proposal made by the Hungarian government in 2011 where raised their voices respectively, the Hungarian Constitutional Court, the European Court of Justice and the European Court of Human Rights, where the judicial independence standard played a minor role on their reasoning.

Keywords: *Judicial Independence; European standards; European Court of Human Rights; Poland; Law and Justice.*

Introduction

The independence of the judicial branch is a foundational value for proper functioning of a society founded upon the rule of law[1] as well as of a society shaped by a constitutional liberal democratic order.

The latter, following the French tradition of Montesquieu[2], is based on the core principle of the "*separation of powers*", which in order to prevent a potential monopoly of power or the emergence of authoritarianism forms, requires the distinction and, therefore, the independence, of the three traditional State's actors, legislative, executive and judiciary branch.

The essential role that separation of powers should play within the liberal democratic order is expressed by the incorporation of the principle itself into many national legal systems at Constitutional level and, amongst the many European legal orders, Article 173 of the Polish Constitution which states as

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[1]See e.g. introduction of International Association of Judges (1999).

[2]Which as clearly noted by Shetreet (2015).

follow "*The courts and tribunals shall constitute a separate power and shall be independent of other branches of power*"[3].

Furthermore, it is worth noting that all the main rules of law's components, namely legality, legal certainty, prohibition of arbitrariness and respect for human rights[4] are mainly influenced for their proper functioning by the further and additional requirement of access to justice mechanisms with regard to which the concept of judiciary independence entails a constitutive prerequisite; in this significance the Judicial independence is "a pre-requisite of the rule of law system"[5].

At international level, the Special Rapporteur of the Commission on Human Rights took a further step when it was clarified that the judicial independence is "part of the general principles of law recognised by civilised nations"[6] and, for that reason, "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the Country. It is the duty of all governments or other institutions to respect and observe the independence of the judiciary"[7].

However, independence does not mean that the judicial power should be non accountable, because if it were so, the independence would degenerate into irresponsibility[8]; therefore, independence should be interpreted not as a value or an end in itself, but as an "*instrumental value*"[9], a means for the appropriate safeguard of other fundamental values and above and beyond the rule of law and the liberal democratic order of the contemporary European constitutional traditions.

European Standards

At the European level, several legal instruments concur to form a more complete European legal scenario, many of which are expressed in the form of *soft law* tools; however, it should be noted the primary importance of the fair trial principle enshrined in Article 6 of the European Convention on Human Rights[10] and Article 47 of the EU Charter on Fundamental Rights is entitled "Right to an effective remedy and to a fair trial"[11].

The other functional legal instruments include the Council of Europe Recommendation on Judges: Independence, efficiency and responsibilities[12], the Council of Europe Recommendation on the Independence, efficiency and

[3]Constitution of the Republic of Poland, 1997, Art. 173.
[4]See European Commission (2014).
[5]The Judicial Integrity Group (JIG) (2002) at Val. 1, Independence.
[6]United Nations (1995) at par. 34.
[7]United Nations (1985).
[8]See Storme (2015).
[9]Cappelletti (1983).
[10]Council of Europe (1950) at Article 6.
[11]European Union (2012) at Article 47.
[12]Council of Europe (2010).

role of judges[13] and the subsequent Opinion No. 1 of the Consultative Council of European Judges[14], the European Charter on the statute for judges[15], the Magna Carta of Judges[16], the Judges' Charter in Europe[17], the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia[18], the Venice Commission's Recommendations[19], the Opinions of CCJE[20] and the Reports of ENCJ[21].

Although the legal scenario could be interpreted, *prima facie*, rather labyrinthine and somewhat twisted, nonetheless, some common principle emerged on the ground and, as a result, they form altogether a shared European perception around the core meaning of judicial independence that could be labelled as the "European standards" framework.

Council of Europe

The standards set by the Council of Europe, the most authoritative institution in the European panorama, firstly, primarily dealt with the appropriate allocation of the principle of Judicial Independence within the national legal frameworks; as a matter of fact, the principle itself should be enshrined in the "*constitution or at the highest legal level in member states*"[22] or "*set out in internal norms at the highest level*"[23] or "*by inserting specific provisions in the constitution or other legislation*"[24].

The 1994 Recommendation showed from the very beginning its fear from an undue pressure by the other State powers, stating that "The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges"[25] and, as a result, the judicial body should be vested with the full guarantee of the principle of irremovability, indeed "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office"[26].

It is interesting to note that the 2010 Recommendation stepped into the core of the matter establishing a twofold nature of the independence, external and internal,

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[13]Council of Europe (1994).
[14]Consultative Council of European Judges (2001).
[15]Council of Europe (1998).
[16]Consultative Council of European Judges (2010).
[17]European Association of Judges (1997).
[18]OSCE (2010).
[19]Venice Commission (2010); Venice Commission (2007).
[20]Consultative Council of European Judges (2001), Consultative Council of European Judges (2003), Consultative Council of European Judges (2005), Consultative Council of European Judges (2007), Consultative Council of European Judges (2014), Consultative Council of European Judges (2015).
[21]European Network of Council for the Judiciary (2010-2011).
[22]Council of Europe (2010) at Chapter I, General Aspects.
[23]Council of Europe (1998) at Principle 1.2.
[24]Council of Europe (1994) at Principle I.2.a.
[25]Council of Europe (1994) at Principle I.2.b.
[26] Council of Europe (1994) at Principle I.3.

where the external influence, more sensitive than the internal, is at the heart of the concept of judicial independence and, as a result it seems to have a broader scope[27].

Furthermore, in the European Charter of the Statute of Judges[28], which its legal effects are non mandatory but only serve as guidelines in order to propel national legislation accordingly, it is worth noting the suggestion to appoint an independent authority composed by the judicial body members with supervisory and authoritative functions within the national legal order, "*the statute envisages the intervention of an authority independent of the executive and legislative powers*"[29] in dealing with cases involving all the issue concerning the judges' careers "*of every decision affecting the selection, recruitment, appointment, career progress or termination of office*".

In doing so, the Charter envisaged a general method of appointing members within the independent authority and the composition of the body, more precisely, "*at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary*"[30].

Venice Commission

The role played by the Venice Commission on the judicial independence matter is, likewise, particularly significant and it converges in the form of general recommendations: the 2007 Report on Judicial Appointments, the 2010 Report on the Independence of the Judicial System[31] and the 2008 European Standards on the Independence of the Judiciary, Systematic Overview[32].

The 2007 Report dawned its introduction around a concern (*rectius* challenge) for the so-called newly established democracies, clearly referring to the forthcoming enlargement of two CEE countries (namely, the accession of Bulgaria and Romania), where concerns related to the independence and political impartiality of the judiciary still persist and, referring to the political involvement in the appointment procedure that could endanger the neutrality of the judiciary.

Afterwards, it called attention in its conclusion on the existence of a crucial criticism, when it stated that, however, no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary[33].

As for the suggested system of judicial appointments, after prior invoking the Council of Europe's Recommendation (94) 12, on the need of "*objective criteria, merit, qualification, integrity*"[34]; the Report suggested the way forward for the approaching Member States when disclosed that:

[27]Council of Europe (2010)12.
[28]Consultative Council of European Judges (2001).
[29]Consultative Council of European Judges (2001) at Principle 1.3.
[30]*Ibid.*
[31]See European Association of Judges (1997).
[32]Venice Commission (2008).
[33]*Ibid.* par. 44.
[34]See Council of Europe (1994) at Principle I, 1.c.

"New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges."[35]

In conclusion, the report coped with the key argument of the need to set up of a Judicial Council and, even though "the mere existence of a high judicial council cannot automatically exclude political considerations in the appointment process"[36], the Judicial Council "should have a decisive influence on the appointment and promotion of judges and on disciplinary measures against them"[37].

Moreover, as regards the suggested composition, the report drawn a double standard, first of all "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself", then, it stressed out the necessity to provide within the Council a "democratic legitimacy" component and, as a result,

"In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament"[38].

The second notable legal tool provided by the Venice Commission is the 2010 Report on the Independence of the Judicial System[39].

At the outset, the report emphasised the double nature, objective and subjective, of the independence which is, consequently, not an end in itself but it should ensure that judges fulfil their essential role of "*guardians of the rights and freedoms of the people*"[40], while underlining at the same time the internal and external components,

"External independence shields the judge from influence by other state powers and is an essential element of the rule of law. Internal independence ensures that a judge takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges[41]*;"*

then, it affirmed that the most authoritative texts on the subject matter are the 1994 Recommendation of the Council of Europe[42] and the Consultative Council of European Judges' Opinion No. 1[43].

[35]Council of Europe (1994) par. 6.
[36]Council of Europe (1994) par 23.
[37]Council of Europe (1994) par. 25.
[38]Venice Commission (1998).
[39]Venice Commission (2010).
[40]Venice Commission (2010) par. 6.
[41]Council of Europe (1994) par. 56.
[42]See Council of Europe (1994) at Principle I.2.a.
[43]Consultative Council of European Judges (2001).

Afterwards, the report focused its attention on the national level that should incorporate the principle, "The independence should be guaranteed pursuant to the provisions of the Convention and constitutional principles by inserting specific provisions in the Constitutions or other legislation"[44] or, even more precisely, "The fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level"[45], therefore, Venice Commission draw a conclusion that "The basic principles ensuring independence should be set out in the Constitution or equivalent text"[46].

With regard to the criteria in order to recruiting the judicial personnel, those according to the Council of Europe's standards should be "based on objective criteria, and selection based on merit, regard to qualifications, integrity, ability and efficiency"[47] and, as a result, Venice Commission came to the conclusion that "All decisions on appointment and the professional career based on merit, applying objective criteria within the framework of the law is indisputable"[48].

In addition, the report set foot into the central question of the establishment of an independent body or authority in order to supervise the overall judicial independence's system and, for that scope, stated that "appropriate method that an independent judicial council have decisive influence on decisions on appointment and career, there is no single model which applies to all countries, while respecting this variety of legal systems, states should consider the establishment of an independent body and in all cases should have a pluralistic composition with a substantial part, if not the majority, of members being judges, with the exception of ex-officio members these judges should be elected or appointed by their peers"[49].

Subsequently, pertaining to the tenure, length of mandate, of the judicial office and to what extent the guarantees should be recognised to the judges, the report citing, firstly, the Council of Europe which expressed that ended up that

> *"strongly recommends that ordinary judges be appointed permanently till retirement age […] the principle of irremovability should have a Constitutional basis, transfers against the will of the judge may be permissible only in exceptional cases* [50]".

On a final note, the report addressed the rules on the proper allocation of judicial cases within the judiciary bodies, showing, firstly, a criticism, "In many countries court presidents exercise a strong influence by allocating cases to individual judges"[51], nonetheless, "Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic

[44]Council of Europe (1994) at Principle I.2.a., Principle I.2.a.
[45]Consultative Council of European Judges (2001) at par. 16.
[46]Venice Commission (2010). par. 22.
[47]Council of Europe (1994) at Principle I.2.a. and I.2.f., Principle I.1.c.,par. 45.
[48]Venice Commission (2010) par. 27.
[49]Venice Commission (2010) par. 32.
[50]Venice Commission (2010) par. 43.
[51]Venice Commission (2010) par. 74.

order of some similar system"[52], or, similarly, "should follow objective criteria"[53], therefore, as a consequence, Venice Commission drawn its conclusion by the following statement "based to the maximum extent on objective and transparent criteria established in advance by law or special regulations on the basis of the law, exceptions should be motivated"[54].

Finally, the Venice Commission further clarified its standards in the 2008 Recommendation on the European Standards on the Independence of the Judiciary, Systematic Overview[55], confirming once again that the principle of judicial independence should be enclosed in Constitutional provisions[56], the decisions concerning the judicial careers should be based on objective criteria[57], the judicial council should have a decisive role in judicial appointments in order to safeguard to judicial independence and its composition should reflect a substantial element or a majority of judicial members[58], the principle of judicial irremovability is a cornerstone in order to prevent democratic backlashes that could erode the judicial independence.

CCJE Opinions and the Magna Carta of Judges

The Consultative Council of European Judges in 2001 with the Opinion No. 1[59] clarified that judicial independence is a pre-requisite of the rule of law and a fundamental guarantee of a fair trial; furthermore, the independence is not a privilege of the judges themselves, but in the interests of the rule of law and of those seeking and expecting justice[60], therefore, the principle should be guaranteed at the highest level and, preferably at constitutional level or among the fundamental principles by those countries with no written text[61]. Moreover, the judges' mandate should be guaranteed until a mandatory retirement age or the expiry of a fixed term of office and irremovability of judges should be enshrined at the highest internal level[62].

Then, the Opinion dealt with the standards concerning the basis of appointment or promotion confirming that all the decisions about the judges career should be based on objective criteria, with the aim of ensuring that the selection and career are based on merit, having regard to qualifications, integrity, ability and

[52]See Council of Europe (1994) at Principle I.2.a. and I.2.f.
[53]Venice Commission (2002) at par. 70.7.
[54]Venice Commission (2002) at par. 81.
[55]Venice Commission (2008).
[56]Venice Commission (2008) at par. 2. *Cfr.* Council of Europe (1994) at Principle I.2.a. and Consultative (2001) at 16.
[57]Venice Commission (2008) at par. 3. *Cfr.* Council of Europe (1994) at Principle I.2.a. and Consultative (2001) at 16.
[58]Venice Commission (2008) at par. 3
[59]Consultative Council of European Judges (2001).
[60]Consultative Council of European Judges (2001) at § 10; see also Consultative Council of European Judges (2015).
[61]Consultative Council of European Judges (2001) at § 14.
[62]Consultative Council of European Judges (2001) at § 57 and § 60; Consultative Council of European Judges (2003).

efficiency[63]; furthermore, these objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favouritism, conservatism and cronyism (or "cloning"), which exist if appointments are made in an unstructured way or on the basis of personal recommendations[64].

Another crucial standard is the need to establishing an independent authority, namely the Council for the Judiciary, in order to supervise the whole process of the judicial appointments, in this meaning the Opinion declared that in the former communist countries, the need is highly pressing and, particularly, for those countries which do not have other long-entrenched and democratically proved systems[65].

In 2010, the Consultative Council of European Judges adopted the Magna Carta of Judges[66] which in the introductory part affirmed that the independence is intended as a fundamental aspect of the general principle known as the *rule of law*, rule of law and independence are intimately connected to each other, "the judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law"[67]

In the text, the most interesting part, is the one about an independent judicial body that should be established in order

> "*to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers*[68]*.*"

Judges' Charter

Another pertinent legal text is the Judges' Charter in Europe, adopted by the European Association of Judges in 1997, which in its introductory remarks gives emphasis to "*the independence of the judiciary as one of the foundations of the rule of law*"[69].

Additionally, when the Charter set foot in the very essence of the Judicial Independence's meaning, it seems the legal text more concerned about the possible erosion of the fundamental principle of "separation of powers" as well as the need to protect the "rule of law" when it observed that "*The process of European integration has brought about an expansion of legislative and executive power*" and "*a genuine separation of powers is indispensable for the proper*

[63]Consultative Council of European Judges (2001) at 25.
[64]Consultative Council of European Judges (2001) at 24.
[65]Consultative Council of European Judges (2001) at § 45, see also Consultative Council of European Judges (2007).
[66]Consultative Council of European Judges (2010).
[67]Consultative Council of European Judges (2010) at Art. 1.
[68]Consultative Council of European Judges (2010) at Art.13.
[69]European Association of Judges (1997).

functioning of any State that respects the rule of law"[70]; this is why, later on, its primary focus was mainly towards the external dimension of judicial independence.

Independence seen as an unassailable[71] value to be protected at national and international level, where the judicial members are accountable only to the law and without paying no need to political parties or pressure groups[72] and, especially, in the appointing procedure no outside influence and no political influence must play any part within[73].

Kyiv Recommendation

The 2010 Kyiv Recommendation[74] is particularly meaningful for a more precise and detailed definition of the role of the National Council of Judiciary, namely the "*Judicial Councils*"; but, unlike the previous European standards already mentioned, it suggested the creation of different independent bodies, not just one, "*a good opinion is to establish different independent bodies competent for specific aspects of judicial administration*" for the reason of "*avoid excessive concentration of power in one judicial body and perceptions of corporatism*"[75].

Furthermore, an advanced innovation, is presented on the matter of the composition required; after having clarified in the same sense of the previous European instruments that "*judge members shall be elected by their peers and represent the judiciary at large*"[76], it introduced an exception to being a judge member specifically addressed to the appellate court judges and, as a result, it stated that

> "*Judicial Councils shall not be dominated by appellate court judges. Where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson".*

European Court of Human Rights' Criteria

Although, the Venice Commission expressed a purely critical voice on the importance, on a more general ground, of the jurisprudence of the European Court of Human Rights, when it critically assessed that as regards to Article 6 of the European Convention on Human Rights, "the case-law of the Court sheds light on a number of important aspects of judicial independence but, by its very nature, does not approach the issue in a systematic way"[77], the judicial experience of the Strasbourg Court remains a crucial legal parameter to reference

[70]European Association of Judges (1997).
[71]European Association of Judges (1997) at Principle 1.
[72]European Association of Judges (1997) at Principle 2.
[73]European Association of Judges (1997) at Principle 4.
[74]OSCE (2010).
[75]OSCE (2010) at Article 2.
[76]OSCE (2010) Article 7.
[77]Venice Commission (2010) at par. 13.

and evaluate the conformity of European national legislations on all issues related to a potential jeopardy of the "fair trial" and, therefore, on the independence (and, impartiality) of the judicial bodies.

Furthermore and despite the fact that neither Article 6 nor any other provision of the European Convention on Human Rights requires that States must comply with a particular theoretical constitutional scheme, previously fixed or suggested, regarding the permissible limits of the powers' interaction and the respect of the separation of power, the question is always whether, in a given case, the requirements of the Convention are met or not[78].

The European Court of Human Rights' case law[79] when it is called to assess whether a judicial body can be labelled as an "independent" one referred, mainly, to four distinct criteria:

- The manner of appointment of the judicial members;
- The duration of the term of the judicial office;
- The existence of certain guarantees against outside pressures;
- Whether the body presents an appearance of independence.

In any case, it is worth noting, that the Court's reasoning, when dealing with the above mentioned parameters, involved necessarily a simultaneous assessment of the "impartiality*",* as a concrete and subsequent outcome; in fact, the following assessment by the Court involved a double approach, *subjective*, that it means to ascertain the personal conviction or concrete interest of the judge in a given case and, *objective*, consisting in determining potential doubts, fears or suspicions of the judges' behaviours and whether he offered guarantees sufficient to exclude any legitimate doubt in this respect[80].

As clarified by the Court, in the vast majority of cases the focus was on the fulfilment of the objective test; however, there is no watertight division between the two approaches since the judge' conduct may not only prompt objectively held misgivings from the point of view of the external observer (objective test) but may also involves the issue of his or her personal conviction (subjective test)[81].

Manner of Appointment

The first criteria involved the method followed in order to appoint the specific members of the judicial bodies and, in particular, the legal institution which should be in charge of the appointment, in other words, whether should be competent the legislative, executive or the judicial power itself.

On the merit, Article 6, par. 1 of the European Convention on Human Rights requires independence not only from the executive and the parties but also from

[78]*Henryk Urban and Ryszard Urban v. Poland* § 46.
[79]*Findlay v. the United Kingdom*: *Campbell and Fell v. United Kingdom* § 78; *Maktouf and Damjanovic v. Bosnia and Herzegovina* § 49; *Brudnicka and Others v. Poland* § 38.
[80]*De Cubber v. Belgium* § 24.
[81]*Micallef v. Malta* § 95; *Kyprianou v. Cyprus* § 119.

the legislator, namely the national Parliaments[82]; however the mere appointment of judges by Parliament cannot be seen to cast doubt on their independence[83]; similarly by the executive is permissible, if the judges are free from pressure or influence when carrying out their duties[84].

For instance, in the case of *Ninn-Hansen v. Denmark*, the applicant complained against the manner of appointment of the lay judges, elected by the Parliament. However the Court declared that there were no reasonable doubts about their fairness of the adjudicatory role, indeed

> *"Although political sympathies may play part in the process of appointment of lay judges…the Court does not consider that this alone gives legitimate doubts as to their independence and impartiality…it is not established that they were appointed with a view to adjudicate this particular case or had declared political affiliations concerning the subject matter in issue. Nor has it been established that there existed other links between Parliament and the lay judges which could give rise to misgivings as to the lay judges' independence and impartiality*[85]*."*

Similarly, the Court declared in the case of *Filippini contra Saint Marin*, that the mere appointment by the legislator is not enough to declare the lack of independence of the judges, which requires a further step,

> *"A cet égard, leur seule élection par le Parlement ne saurait entacher l'indépendance des juges s'il ressort clairement de leur statut que, une fois désignés, ils ne reçoivent ni pressions ni instructions de la part du Parlement et exercent leurs fonctions en toute indépendance."*

To establish a lack of independence in the manner of appointment, it is either necessary to show that the practice of appointment as a whole was unsatisfactory, or alternatively, that the establishment of the particular court or the appointment of the particular adjudicator gave rise to a risk of undue influence over the outcome of the case[86]; therefore, even though at stake is the independence of the judges, it will be necessary on the course of the overall legal reasoning a further assessment on the matter of impartiality in its outward form as the result of a lack of independence.

To sum up, although the assignment of a case to a particular judge or court and, therefore, the manner of their appointments falls normally within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6, par. 1, and, in particular, with its requirements of independence and impartiality[87].

[82]*Crociani et al v. Italy*.
[83]*Filippini contre Saint-Marin*.
[84]See, *Henryk Urban and Ryszard Urban v. Poland*, *Campbell and Fell v. United Kingdom*, *Maktouf and Damjanovic v. Bosnia and Herzegovina*..
[85]*Ninn-Hansen v. Denmark* § 20.
[86]*Zand v. Austria* § 78.
[87]*Moiseyev v. Russia* § 176.

Term of the Office

The second requirement is the duration of the appointment; no particular term of office has been specified as necessary minimum; it is true that irremovability of judges by the executive during their term of office must, in general, be considered a corollary of their independence and thus included in the guarantees of Article 6, par. 1; however, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present[88].

> *"The term of office is admittedly relatively short but […]there is a very understandable reason: the members are unpaid and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer"[89]; on the other hand, a renewable four year appointment for a judge who was a member of a national security court was considered "questionable" by the Court in the case Incal v. Turkey "On the other hand, other aspects of these judges' status make it questionable […] Lastly, their term of office as National Security Court is only four years and can be renewed"[90]."*

From another perspective, the Court, in the case of *Maktouf and Damjanovic v. Bosnia and Herzegovina*, considered the judicial mandate in line with the Article 6, par. 1, in a case questioning the presence of international judges appointed for a renewable two years' term on the bench of a court ruling on war crimes taking into account, on the whole, external and outward factors and, as a result, it concluded that

> *"Admittedly, their term of office was relatively short, but this is understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments[91]."*

Interestingly, the Court in the case *Gurov v. Moldova,* where the applicant alleged a breach of Article 6 as the term of the office of a judge hearing a case was expired, provided an innovative interpretation of the term "*established by law"*, which object is to ensure "*that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament"*, moreover and, most importantly, the term covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case[92].

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[88]See *Campbell and Fell v. the United Kingdom*, § 80, *Engel and Others,* Series A no. 22, § 68, *Henryk Urban and Ryszard Urban v. Poland,* § 45, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, § 49.
[89]*Campbell and Fell v. the United Kingdom*, § 80.
[90]*Incal v. Turkey*§ 68.
[91]*Maktouf and Damjanovic v. Bosnia and Herzegovina* § 51.
[92]*Gurov v. Moldova* § 34-35; *Posokhov v. Russia* § 39.

Therefore, the Court concluded that there were no legal grounds for the involvement of the judge and, therefore, the case had not been heard by a tribunal established by law and, moreover, tacitly prolonging the term was in contradiction with the principle that the judicial organisation in a democratic society should not depend on the discretion of the executive[93].

Guarantees against Outside Pressures

The third condition invokes the guarantee against an outward or outside pressure performed by the other State powers, the Court in *Campbell and Fell v. the United Kingdom* prescribed that the judicial members of a tribunal must, at a very minimum, be protected against a removal act passed by the legislate branch during their terms of office stating that

> *"The irrevocability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 §1. However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present.*"

This case looks particularly meaningful and sensitive as it deals directly and concurrently with two Court's criteria, respect of the term of the office and guarantee from an outside pressure, which appear to be in all of the cases concerning a pre-term removal prescribed by a legislative body an overlapping criteria put through the same Court's reasoning and legal analysis.

Furthermore, the European Court in the case of *Sovtransavto Holding v. Ukraine*[94], where the applicant lodged a complaint because of an assumed strong political pressure and the permanent monitoring of the legal proceedings by the Ukrainian authorities, including the President of Ukraine, found a clear violation of Article 6, par. 1 of the Convention, having regard to the interventions by the executive branch of the State in the judicial proceedings as, it declared that

> *"[...] the Ukrainian authorities acting at the highest level intervened in the proceedings on a number of occasions. Whatever the reasons advanced by the Government to justify such interventions, the Court considers that, in view of their content and the manner in which they were made, they were ipso facto incompatible with the notion of an "independent and impartial tribunal" within the meaning of Article 6, par. 1 of the Convention".*

[93] *Gurov v. Moldova* § 37.
[94] *Sovtransavto Holding v. Ukraine* § 40.

In a similar manner, and most interestingly, in *Kinsky v. the Czech Republic*[95], the Court while declaring in its conclusion a violation of Article 6, par. 1 of the Convention, affirmed that

> *"the activities of certain politicians referred to by the applicant, be they verbal expressions to the media or other, aimed at creating a negative atmosphere around the legal actions of the applicant or constituting direct attempts to interfere in these proceedings, were unacceptable in a system based on the rule of law;"*

therefore, it seems that even an indirect pressure performed by other State actors could amount to an illegitimate intervention sufficient to disturb, influence or shift the parameter of the judicial independence.

On a final note, it is not surprising that the Court when it is called to cope with the criteria of the guarantees against outside pressure acts in a very cautious and wary method, as it involves a very problematic argument, as it is the separation of powers, where no fixed models can be applied to national States and where the national sovereignty, expressed by the parliamentary will, still plays a role as primary leading actor in establishing national constitutional orders.

Appearance of Independence

The fourth needed requirement is the one concerning the appearance, which recalled the standpoint of an objective observer and, furthermore, the recognition of the judicial body by the people in terms of impartiality.

The Court reiterates that impartiality denotes the absence of prejudice or bias and its existence can be tested in various ways, the existence of impartiality for the purpose of Article 6, par. 1, must be determined according, first, to a "*subjective test*" where regard must be had to the personal behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case and also according to an "*objective test*", that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.[96]

As stated by the Court, in *Morice v. France*, as to the objective test, it must be determined whether there are ascertainable facts which may raise doubts of impartiality and, the standpoint of the person concerned is important but not decisive, what is decisive is whether this fear can be held to be objectively justified[97].

An appearance of independence is crucial because as the Court clarified *"what is at stake is the confidence which the courts in a democratic society must inspire in the public"*[98] and the appearances itself may be of a certain importance,

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[95]*Kinsky v. the Czech Republic* § 23.
[96]*Morice v. France* § 73; *Kyprianou v. Cyprus* § 118; *Micallef v. Malta* § 93.
[97]*Morice v. France,* §76; *Micallef v. Malta* § 96.
[98]*Incal v. Turkey* §48*; Fey v. Austria* §56; *Morice v. France*;§ 78.

"*justice must not only be done, it must also be seen to be done*"[99]; as factual examples, whether the public is reasonably entitled to entertain doubts as to the independence or impartiality of the tribunal[100], whether there are legitimate grounds for fearing[101], whether there are ascertainable facts that may raise doubts or whether such doubts can be objectively justified[102], in so far, the objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings[103].

In *De Cubber v. Belgium*, the Court focusing on the objective test because it said that "*however, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach)"*[104], referring to the Belgian Court of Cassation according to which any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw because what is at risk is "*the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused"*[105].

The Polish Constitutional Tribunal

The first judicial body exposed to the judicial reform plan initiated by the Polish ruling party, Law and Justice, was the Polish Constitutional Tribunal (*Trybunal Konstytucyjny*).

As a preliminary note, it is worth mentioning that Article 194 of the Polish Constitution explicitly states that "The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office".

The procedural changes that have occurred within the CT have been numerous and, among the many, a new quorum of eleven out of fifteen judges for certain decisions, the possibility for four judges to postpone any decision if they are not satisfied after an initial internal vote, the necessary presence of the prosecutor general for certain set of decisions, further disciplinary proceedings against the elected constitutional judges and a more wary publication of the CT judgments which currently relies on the formal approval of the Prime Minister and a broad and extensive list of hypothesis in which the publication of the judgements could be legitimately delayed[106].

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[99]*Denisov v. Ukraine* § 63.
[100]*Campbell and Fell v. the United Kingdom* § 20.
[101]*Langborger v. Sweden* §34; *Procola v. Luxembourg* §42; *McGonnell v. the United Kingdom* §63.
[102]*Castillo Algar v. Spain* § 45.
[103]*Micallef v. Malta*, § 97.
[104]*De Cubber v. Belgium* § 26.
[105]*Ibid.*
[106]See Sanders & von Danwitz (2018).

However, the most notable step taken by the Polish ruling party was a test of strength or showdown consisting in the replacement of five judges already sitting into the Constitutional Tribunal appointed after an endless legal diatribe based on several and twisted pre-facts[107].

A few days before the 2015 parliamentary elections, on 8 October 2015 (by the end of the 7th Term of Sejm), the lower Chamber of the Parliament, the old Sejm, elected five new judges, based on the amendment of the CT of 25 June 2015, instead of the appointment of just three judges, which as stated by both scholars and the Constitutional Court the election of those two extra judges was clearly improper and patently unconstitutional[108].

On the matter, the Constitutional Tribunal in its notable ruling K 35/15 declared that the election of the two extra judges was improper and, therefore, unconstitutional because was done by the VII Sejm, whose term ended on 12 November, while the tenure of the elected judges was to commence on the 2nd and 8th December respectively, the same day the nine-year tenure of the two former judges ended. Conversely, the appointment of the other three judges, whose tenure ended on 6 November, were proper and according to Constitution, as the tenure of the Sejm overlapped with the date of the ending of their mandate[109]; in other words, only the Sejm in office during which the mandate of the CT judges will expire is authorised to make the judicial appointment.

Afterwards, the Parliament, guided by the ruling party majority, adopted a resolution on 25 November[110], according to which all five judges had to be considered as irregular members and their election as null and void, consequently, on that ground on 2 December 2015 the new Sejm elected five new judges, reshaping the composition of the Constitutional Tribunal.

As stated by the Constitutional Tribunal in the K 34/15 judgment, although, the former appointment of the two judges were, in fact, unconstitutional, the remaining mandate of the three other members were made according to the constitutional standards, therefore, the new government would have been allowed to appoint only two judges, rather than five of them in December 2015.

Furthermore, the other crucial legal argument for declaring the legitimacy of the new appointed judges was the one concerning the precise moment when they should assume their judicial office and, especially, the formality of the oath before the President of the Republic.

In short, the process of becoming a judge, in theory, ends with the election in the Sejm but in practice ends only after being sworn in by the President[111] and on that basis the President, after the election of the five judges by the old Sejm,

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[107]For a comprehensive and complete review of the constitutional crisis see Sadurski (2018).
[108]See Judgments of the Constitutional Tribunal of Poland: K 35/15, K 47/15, K 39/16, and U 8/15.
[109]See Jankovic (2016).
[110]Official Gazette of the Republic of Poland 2015, item 1182-1186; see Sadursky (2018) at 21: "*The Constitution does not recognise the possibility of such a resolution annulling an earlier election of judges, a resolution which effectively adds a new, extra-constitutional, method of extinguishing the judicial term of office*".
[111]Art. 5.5. and 5.6. of the Polish Constitutional Tribunal Act.

refused to take the oath from them; however, on 2 December, the President took the oath by the new five judges immediately after their appointment.

The ruling of the K 34/15 judgment declared that the President has to take oath from elected judges immediately but the exclusive right to appoint judges rest in the power of the Sejm; as a result, the appointment ends with the election of Sejm and not with oath. Similarly, the K 35/15 judgment, declaring unconstitutional the amendment to the CT Act of 19 November 2015, which introduced a 30-day period during which the President should take the oath from elected judges, it would contradict the former judgment, K 34/15, as the President is obliged to take the oath immediately and introduced a role of co-participation, not prescribed by the constitutional scheme, in the election of the members of the Constitutional Tribunal.

Nonetheless and, quite predictably, the reshaped Constitutional Tribunal on 24 October 2017 handed down a judgment (K 1/17[112]), which contrary to the previous statement of the K 34/15 and, in contradiction with Art. 194 Constitution and its well-established interpretation, declared that the most important and constitutive element in order to held the office of judge, member of the Constitutional Tribunal, is the requisite of the oath before the President[113].

The National Council of Judiciary

The Polish National Council of Judiciary (*Krajowa Rada Sadownictwa* or *KRS*) performs a crucial role within the Polish Constitutional boundaries as it was created in 1989 in the wake of the democratic transition as an authority to safeguard the independence of courts and judges[114].

According to Article 186 of the Polish Constitution, the supreme judicial body acts as a guardian of the whole judicial system and, in this meaning, it "shall safeguard the independence of courts and judges"; its main task is to make judicial appointments by a motion which should be approved by the President of the Republic who formalised the proposed appointments[115], then additional powers include submitting issues of constitutionality review to the Constitutional Tribunal, adopting a judicial code of ethics, expressing opinion on draft legal reform.

Concerning the KRS members, the composition is a mixed one which include all of the three powers of the State, Article 187 established in 25 the number of its members: 15 members from the judiciary branch, 4 members chosen by the Sejm among its deputies, 2 members chosen by the Senate among its members, the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and one member appointed by the President of the Republic.

[112] See Judgment of the Constitutional Tribunal of Poland - K 1/17.
[113] Sadursky (2018) at 22.
[114] Mikuli (2017).
[115] Poland's Constitution, Art. 179.

In particular, the Constitution text stated that "15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts" and, some scholars affirmed that, therefore, the selection is mostly conferred to the judiciary itself[116], meanwhile, other commentators raised doubts on the legal text which it seems to not provide, explicitly, that judge members should be elected by the judiciary itself, even though it has always been understood that they are elected by the judiciary itself[117].

Having clarified the Constitutional relevance of the National Council of Judiciary, the reform process which involved the judicial body went through a twostep process, an original draft proposal, then rejected by the President of the Republic which, later on, became with some adjustments a definitive legal reform.

According to the first draft proposal, adopted by the Parliament on 12 July 2017 (Act of 23 January 2017), the National Council of Judiciary would have been divided into two different chambers, one of judicial composition, meanwhile, the other composed of political members and, a decision for become binding should have gained the consensus from both chambers. Moreover, other innovations include, in the case of the application of multiple candidates for a vacant position, the Council should have presents at least two names to the attention to the President, who could choose one of them discretionally, the power to appoint judicial members entirely entrusted by the low chamber (Sejm), to terminate, immediately, the mandate of the sitting judges through a specific transitional provisions.

However, the President of the Republic expressed concerns on the amendment referring to the immediate termination of the judicial mandate, especially in relation to the Article 187, par. 3, of the Constitution, which established that "The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years" and, therefore, vetoed the initial proposal.

The definitive version on the new Council of Judiciary voted by the Sejm on 8 December 2017 and Senate 15 December 2017, signed by the President on 20 December 2017, came into force on the date of 15 January 2018, which confirms the election of the 15 judicial members by the lower chamber, Sejm, performed through a quite twisted procedure.

First of all, the candidates may be proposed by groups of citizens (2000) or 25 judges, then on that basis each of the parliamentary caucuses could nominate up to 9 candidates and, later on, the parliamentary committee will select 15 candidates to be presented to the Sejm; the low chamber, in the first round, will elect the appropriate candidates by a 3/5 majority and, if the quorum is not achieved, the Sejm seems to be able to elect the candidates by a simple majority procedure or even less.

More precisely, in the second round candidates are elected "by a roll call", each Parliamentary member has one vote and may vote only one candidate, candidates who have received the highest number of votes shall be deemed to

[116]Sanders & von Danwitz (2018) at 776.
[117]Sadursky (2018) at 143.

have been elected and each Parliamentary member may vote for or against, or abstain; afterwards, in case of tie, a candidate who received fewer votes against will be elected[118].

However, Parliament is not obliged to select candidates with sufficient support in the judiciary and may choose candidates who have only minimal support amongst their colleagues and, for this reason, Venice Commission emphasised the procedure as "regrettable" because the judicial community has insufficient weight in the NCJ election[119].

Furthermore, a pre-term removal of the sitting judges, despite the 4 years' term guaranteed by the Constitution, indeed, the Article 6 of the Act provides for an early termination of the term of office of all sitting judicial members supported by the judgment of the Constitutional Tribunal of 20 June 2017[120], where the Court declared that the term of the office of the members should be seen as a collective term, as a body, and not as an individual term of office.

In this regard, the Venice Commission after showing all of its scepticisms about the notion of "joint term of office", stated that even assuming the latter as politically legitimate, the Polish aim could have been achieved differently, "the currently serving judicial members may remain in their position until the original term of their mandate expires, while new members could be elected for a shorter period, ensuring that at some point in future the whole composition of the NCJ will be renewed simultaneously. This solution will not only respect the security of tenure but also better ensure the institutional continuity of the body"[121].

The Law on the Supreme Courts

The new Polish Law on the Supreme Court ("the Law on the Supreme Court"), entered into force by 3 April 2018, prescribes several legal innovations: a new retirement age for all the sitting judges, a new method for appointing the Chief Justice of the Supreme Court, an increase of the total number of the sitting judges, the creation of two new chambers, one for hearing disciplinary cases and another for extraordinary appeals and, lastly, a new judicial review procedure called the "extraordinary complaint"[122].

Evidently, the new age limit drawn up by the reform is the main target of severe criticisms displayed by scholars[123] and institutional European actors; indeed, the Law on the Supreme Court, prescribed in section 37, a lowering of the current retirement age applies to all judges, including those appointed before the entry in force of the law, pushing it down to 65 years; thus, as it

[118]Venice Commission (2017) at par. 21.
[119]Venice Commission (2017) at par. 27.
[120]Judgment of the Constitutional Tribunal of Poland: K 5/17.
[121]Venice Commission (2017) at par. 30, which recalls Venice Commission (1998) at para 20, 21.
[122]See, Sadursky (2018) at 146.
[123]Sadursky (2018) at 145; Sanders & van Danwitz (2018) at 35.

patently appears the most concerning argument of the new reform is the prevision of the so-called "*early retirement age*".

Nonetheless, the judges affected by the retirement age requisite could continue to hold their judicial office under three certain specific conditions:

- a submission of a statement indicating the desire to continue to perform his duties;
- a certificate stating a good health conditions;
- a formal approval by the President of the Republic

The third condition, the mandatory approval by the President of the Republic, seems to be the most debatable and controversial prerequisite, for the reason that the President itself seems not bound by any legal criteria and, furthermore, his final decision is not subject to a further judicial review.

Venice Commission expressed its concerns when it stated that

> *In the first place, there is no apparent rationale determining the office of which judges might be extended; it appears to be at the discretion of the President of Poland. This will give the President excessive influence over those judges who are approaching the retirement age*[124]

and, concerning the substantial absence of judicial remedies, "*Under the Draft Act, Polish judges exposed to early retirement would not have any judicial remedy at their disposal. Given the recent developments in the case-law of the ECtHR, absence of judicial remedies in this situation appears problematic*"[125].

In particular, Venice Commission referred its concerns taking into account the meaning expressed in the pivotal case *Baka v. Hungary*[126], concerning the right of access to further judicial remedies for civil servants in case of prematurely dismissal from the judicial office, where the European Court of Human Rights declared the existence of a violation of the right of fair trial as enshrined in Article 6, § 1 of the Convention[127].

The Hungarian Precedent

In 2011 Hungary adopted a similar legislation of the one propelled by Poland regarding the shortening of the mandatory retirement age for judges from 70 to 62 years within a short transitional period, afterwards, the European Commission in January 2012 launched an infringement proceedings and referred the case to the Court of Justice of EU[128].

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[124]Venice Commission (2017) at par. 51.
[125]*Ibid*, § 50.
[126]*Baka v. Hungary.*
[127]*Baka v. Hungary* § 196.
[128]ECJ Case C-286/12, Commission v. Hungary; however, on 20 November 2013, the Commission closed the infringement procedure because "*the new law adopted by the Hungarian Parliament on 11 March 2013 lowers the retirement age for judges, prosecutors and notaries to 65 over a period of 10 years, rather than lowering it to 62 over one year, as before […]The new law also*

Reducing the age of retirement, as a general concept, and effectively shortening the term of office during the term may be considered unconstitutional, as was found by both the Hungarian Constitutional Court[129] and the Court of Justice of the EU[130]; moreover, the Venice Commission, relied upon the Hungarian Constitutional Court judgment, declared that "It trusts that the Hungarian authorities will respect this judgment and ensure its implementation, i.e. re-instate the former judges to their previous position"[131].

Indeed, the Hungarian Constitutional Court declared unconstitutional the retirement age provisions for violation of judicial independence on formal and substantive grounds; from the formal requirement, the reform should have determined the length of judicial service and the precise retirement age, being not enough clear the reference to the general retirement age, meanwhile from the substantive ground, the new law resulted in the removal of judges within a short period of three months has to be seen as a clear risk to the judicial safeguards and, therefore, contrary to the constitutional provisions[132].

Likewise, in the case C- 286/12, the Court of Justice of the EU based its decision on the proper application of the antidiscrimination directive[133], stating that even if the "standardisation of retirement age" or a "balanced age structure" could amount to a legitimate employment policy objective, the measures put forward by the Hungarian government were not necessary nor proportionate to achieve this aim[134].

Finally, the Hungarian reform was contested on the international level before the European Court of Human Rights in the well-known case *Baka v. Hungary*, lodged by the former President of the Supreme Court against the premature termination of his mandate which should constitute a violation of Article 6, § 1 of the European Convention, namely the right to a fair trial, for the reason that no judicial remedy was technically possible in order to react to the alleged violation; indeed, the Strasbourg Court confirmed that the reform enacted at a constitutional level was not subject to any form of judicial review even by the Hungarian Constitutional Court and, as a result, found a breach of the right to access to a court for a judicial remedy and, therefore, a jeopardy of the right of a fair trial.

However and quite surprisingly, as already pointed out from several scholar works, the international institutions dealing with the pith of the Hungarian case, Court of Justice of the EU and European Court of Human Rights limited themselves to rather technical questions and they evaded more precise and detailed remarks on the authentic background of the case (judicial independence) and,

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provides for the right for all judges and prosecutors who had been forced to retire before to be reinstated in their posts, with no need to bring a case to court. Moreover, they will be compensated for remuneration lost during the period they were not working".

[129]Judgment no. 33/2012 (VII. 17) of 16 July 2012.

[130]ECJ Case C-286/12, Commission v. Hungary.

[131]Venice Commission (2017) at par. 75.

[132]*Baka v. Hungary* § 45.

[133]European Union, Council of the European Union, Council Directive 2000/78/EC (2000).

[134]See Vincze (2014) at 207.

therefore, surrounded in a very cautious and wary way the judicial independence argument[135].

Conclusion

The judicial reform plan carried out, right after the parliamentary election of 2015, by the new Polish parliament with a strong majoritarian component guided by the Law and Justice party raises several problematic and intricate assessments at European level taking into account the consolidated European standards on the matter.

The political and legal diatribe which involved the composition of the Polish Constitutional Tribunal appears to be particular sensitive with regard to the proper interpretation of the crucial principle of separation of power where the legislative and executive branches must abstain from an overdue influence upon the judiciary especially when it comes to deal with the selection process; the warning enclosed in the introductory remarks by the Judges' Charter about the European integration process, the increasing role of the legislative and executive powers and the future risks of the erosion of checks and balances sounds now greater than ever, particularly within the group of fragile democracies.

Furthermore, the new composition of the Supreme Tribunal and its proactive role in enforcing the political and legal legitimacy of the parliamentarian stances, as for instance the U-turn on the K 34/15 ruling, takes into the spotlight several suspicions from the European Court of Human Rights perspective and the criteria developed by its well-established jurisprudence, particularly on the manner of appointment, the guarantees against an outside pressure and the appearance of independence of the judicial body.

Next in order, the new legal reform that reshaped the Polish National Council of Judiciary, a judicial body in charge of the protection of the independence of courts and judges, which establishes a pre-term removal for all the sitting judges along with the increased power of the Parliament in the appointment process seems to clash with all the existing European standards on the matter.

First of all, as previously clarified by the 1994 Council of Europe Recommendation the principle of irremovability must assume a decisive weight according to which the judges' mandate should have guaranteed till the expiry of the term of the office; then, it is an established and unanimous standard the one which requires that a majoritarian component or, at least one half, of the judges members of the National Council of Judiciary should be elected by their peers, even though, the "democratic legitimacy" element of the Parliament should play a role on the election of the residual judicial members.

Lastly, the new law on the Supreme Courts which prescribed, similarly to the former Hungarian reform, an early retirement age for all the sitting Supreme Courts' judges, could pose a serious risk of consistency with the principle of irremovability, corollary of the judicial independence, for several order of reasons

[135]Sanders & von Danwitz (2018) at 785; Vincze (2014) at 212, when it stated that "The judgment of the ECJ did not even mention the world judicial independence".

and, primarily, in the exceptional cases of a judge who wish to continue to held its office on the requisite of the formal approval by the President of the Republic.

Indeed, the President's decision seems not bound by any legal criteria and there is no chance of judicial review for the retired judges that could potentially lead to a short-circuit before the European Court of Human Rights which should be called to pronounce to several cases and to replicate *ad infinitum* the legal reasoning previously expressed in *Baka v. Hungary,* where the lack of judicial remedies in case of an early judicial dismissal guided the Court to declared the violation of the Article 6, § 1 of the Convention.

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The 1982 United Nations Convention on the Law of the Sea as an Agreement Solving Some Issues with Aspects of Strategic Importance

*By Yulia A. Shabalina**

The purpose of this article is to focus mainly on two aspects, which the author considers to be aspects of strategic importance. The first is to study the legal regulation of marine scientific research in the exclusive economic zone and on the continental shelf. The second is to examine the regime of the exploitation of the continental shelf beyond 200 nautical miles from the baselines from which the breath of the territorial sea is measured. The author also finds it interesting to distinguish the rights of coastal and non-coastal states in the above mentioned issues according to the UNCLOS from the national law taking as an example the law of the Russian Federation.

Keywords: *Exclusive economic zone; Continental shelf; Coastal and non-coastal states; Natural resources; Maritime scientific research; Geological examination; Exploration and exploitation of mineral resources; Protection of the marine environment; UNCLOS;*

Introduction

Russia borders on 13 seas which belong to the basins of 3 oceans. The Atlantic Ocean includes the Baltic, the Black Seas and the Sea of Asov. The Arctic Ocean embraces the Barents, the Pechora, the White, the Kara, the Laptev, the East Siberian and the Chukchi Seas. The Pacific Ocean encompasses the Bering Sea and the Seas of Okhotsk and Japan. The thirteenth sea is the Caspian Sea - the closed lake. The length of the border of the Russian Federation amounts to 60 933 km, 38 808 km of which is a maritime boundary.

The length of a state's sea coast does not equate to its political and economic activity in the World Ocean, however. In previous times access to the sea could provide a coastal state with manifold opportunities to obtain the status of a "maritime power". Although we do not use such notions now and consider each other as economic partners, until today access to the sea is an enabler of the enhanced commerce of a coastal state[1].

In order for the interests of coastal and non-coastal states not to collide, it is of a paramount importance for a country to abide by the international maritime law. The 1982 United Nations Convention on the Law of the Sea[2] is the main convention focused on the protection of the marine environment, the security

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[1]Analogously, when we deal with the international law, we shall substitute the geopolitical notion "political ambitions" with more neutral and juridically appropriate "state interests".

[2]Hereinafter "the UNCLOS".

of the interests of the national fishing and transport organisations, the conservation and management of living and non-living natural resources and other issues of the maritime law.

As stated by the UN General Assembly in its annual resolutions on the oceans and the law of the sea, “it is necessary to bring the national law to the conformity with the provisions of the UNCLOS”[3]. The Russian Federation signed the UNCLOS on 10th of December, 1982. Russia ratified the Convention on 12th of March, 1997. Since then the UNCLOS has become the integral part of Russian law according to Par. 4 of Art. 15 of the 1993 Constitution of the Russian Federation[4].

Explaining why the Convention should be ratified by the USA, Prof. J. Daff, the American specialist in the international law, singled out all the directions touched upon in the UNCLOS where many questions of dispute for the USA had already been solved. They are “the national security, the military perspectives, the diplomacy, the commercial shipping, the scientific issues, the delimitation of the continental shelf, the industrial prospects and the protection of the environment”. Russian scientists Kolodkin, Guzuljak and Bobrova maintain that “these priority directions fully coincide with the interests of the Russian Federation”[5]. Thus, the UNCLOS is considered to be one of the best solutions to the issues of strategic importance for the security of the interests of any independent state.

Outline and Literature Review of the Topic

This article is constructed so that we will deal first with the question of marine scientific research and then we will proceed with the exploration and the exploitation of mineral resources. The author has chosen this approach because she thinks that undertaking researches of mineral resources could be the prerequisite of the exploration and the exploitation of such, if a country decides to continue to explore and to exploit the resources at the site. It is supposed that this statement is true when the activities are undertaken by one or by many actors.

If we consider the research and the explorations to be conducted by one coastal state, the article will lose the strategic aspect of its content. The theme becomes disputable when there is more than one state in the mentioned activities. That is why we are going to investigate how the international maritime law regulates the activities of two or more coastal states as well as the activities of coastal, non-coastal states and professional international organisations *inter se*.

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[3]Kolodkin, Guzuljak and Bobrova (2007) at 28.
[4]Par. 4 of Art. 15 of the Constitution of the Russian Federation (1993) states that “the universally-recognised norms of the international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or an agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied”.
[5]Kolodkin, Guzuljak and Bobrova (2007) at 28.

There is also an assumption that marine researches are sometimes launched due to a wish of the community to receive more information of a different kind from the waters of a coastal state. This idea is not going to be considered in the article because of the absence of competing interests.

The analysis is built so that only far remote marine areas are taken into account. We will study the exclusive economic zone and the continental shelf as the objects of research. The continental shelf beyond 200 nautical miles from the baselines from which the breath of the territorial sea is measured[6] seems to the author to be the most interesting issue to research, because this area of the exploitation of the mineral resources is under no state`s jurisdiction, which generates a rivalry among the most strategically powerful states in the epoch of the lack of the natural resources as such.

There is no legal document or a piece of literature where one can find a better explanation of the regimes of water spaces rather than they are indicated in the UNCLOS. Some details on the continental shelf could be found in Annex II: Commission on the limits of the continental shelf. This is a part of the UNCLOS. Another significant source of information here is the Rules of the Procedure of the Commission on the Limits of the Continental Shelf, adopted in the twenty first session of the Commission on the limits of the Continental Shelf on 17th of March - 18th of April, 2008. Both documents of the Commission are placed on the page of the Website of the UN Commission[7].

Being a coastal state, Russia has some federal laws on both merits: on the conducting of marine researches and on the exploitation of resources in different parts of the sea. I have analysed the Federal Law "About the Continental Shelf of the Russian Federation"[8], the Rules to conduct a marine scientific research in the internal waters, the territorial sea, the exclusive economic zone and on the continental shelf of the Russian Federation[9] and the Decree "About the continental shelf of the Russian Federation in the Okhotsk Sea"[10]. I have also made general references to the 1993 Constitution of the Russian Federation and to the scientific book, dedicated to the issues of the international maritime law[11].

The Conducting of a Marine Scientific Research in the Exclusive Economic Zone and on the Continental Shelf under the 1982 UN Convention on the Law of the Sea and the Russian Legislation

The conducting of a marine scientific research in the exclusive economic zone and on the continental shelf is regulated by one article of the UNCLOS. Art. 246 of the Convention empowers a costal state to regulate, to authorise and to conduct a marine scientific research in its exclusive economic zone and on its

[6]Hereinafter "the continental shelf beyond 200 nautical miles".
[7]http://www.un.org/depts/los/clcs_new/commission_documents
[8]No 187-FZ of November 30, 1995
[9]No 391 of July 30, 2004
[10]No 845 of August 15, 2015
[11]Kolodkin, Guzuljak and Bobrova (2007).

continental shelf. Paragraph 5 of this Article provides for the grounds when the costal state in its discretion withholds its consent to the conducting of the marine scientific research project of another state or a competent international organisation in the exclusive economic zone or on the continental shelf of the coastal state, if, according to Subparagraph "a", the project is of a direct significance for the exploration and exploitation of natural resources, whether living or non-living.

Judging by Subparagraphs "b" and "c", we find that they address only two subjects that are allowed to make a research: a state and a competent international organization. At the present time there is a set of organisations and systems that enable people to select data and to keep records in the marine environment. Among such systems are the Organisation of a regular process of the marine environment estimation, the Global system of the Earth monitoring systems, the Argo Program and the Ocean data, instruments and devices acquisition system. If the activities of such organisations and systems fall under the activity regulated by Par. 5 of Art. 246, such organisations and systems should request the coastal state`s permission to conduct a research.

Since the international law refers to national legal procedures anyway, the national legislation of a costal state must contain, and they usually do, more elaborated provisions for performing a research process, especially for the admission of the research applicants. The Rules to conduct a marine scientific research in the internal waters, the territorial sea, the exclusive economic zone and on the continental shelf of the Russian Federation[12] regulate the process of making a research, including how to assess a research and to make a decision upon the received data.

The Rules also provide for the grounds to withhold the applicants consent of a marine scientific research project. They are listed in Art. 38 of Chapter V "The grounds for issuing a licence". It regulates analogous legal relations in a more detailed way then the UNCLOS does. A scientific research must not only be "of a direct significance for the exploration and the exploitation of natural resources", as stated in the Convention, but also be "related to the examination, the search, the exploration and the exploitation of non-living natural resources or be related to the examination, the exploration and the exploitation of living resources"[13]. Consequently, the scope of the legal relations to be regulated by the Russian legislation is wider than the one considered by the international law.

At the same time, one could argue that enumerating different activities "of a direct significance for the exploration and the exploitation of natural resources" hardly makes any legislation more elaborated. Indeed, the national law is a vivid reflection of the international law. – Regardless, one may suppose that, when alleging in the court, it is easier for a legal entity or a physical person to refer to a concrete provision in the national law than to prove that its actions fall under the ambiguous wording of the issue in the international law.

[12]No 391 of 30 July, 2004

[13]Subparagraph "a" of Art. 38 of the Rules to conduct a marine scientific research in the internal waters, the territorial sea, the exclusive economic zone and on the continental shelf of the Russian Federation

The Federal Law "About the Continental Shelf of the Russian Federation"[14] is another example of Russian law where the national legislator establishes more detailed provisions than the UNCLOS does. For example, it prescribes the time limits to apply for a license. According to Art. 26 of the Federal Law, the competent international organisation, where the Russian Federation is a party or with which the Russian Federation has signed a bilateral treaty, can start a research, if the Russian Federation has approved of the project and its federal bodies have not sent any objection four months after the application was sent. In case the applicant is a foreign state or a Russian entity, according to Art. 24 of the Federal Law, it is empowered to make a research in terms, provided for in the application, but at least six months after the request or the required additional information was sent. The author believes that the national law will always have more elaborated provisions in comparison with the Convention, because it is the authorities of the coastal state who face the procedure of the direct request.

Another ground to withhold the consent for the research, established in Par. 5(b) of Art. 246, is when the project involves the drilling into the continental shelf and the use of the explosives or the introduction of harmful substances into the marine environment. The Convention vests a coastal state with the exclusive right to regulate the drilling and the use of explosives on its continental shelf. In Russia the federal executive bodies authorizing other entities to conduct researches and to issue licenses do it in coordination with the Federal Service for the technical and export control of the Russian Federation that gives its recommendation having checked the activities of a foreign entity in accordance with the Ruling of the RF Government "About the placement and the use on the territory of the Russian Federation of the foreign technical means of control and observation on the exclusive economic zone of the Russian Federation".[15]

Prohibited activities include drilling, the use of explosives, the burial of waste of different types of production, carbon dioxide burial, oil spills, which pollute the marine environment. In order to control such activities for the purpose of the prevention and reduction of the pollution the coastal state exercises its jurisdiction following the principle of the conducting of marine scientific research for peaceful purposes, as provided for in Art. 240(a) of the Convention.

Art. 25 of the Federal Law "About the Continental Shelf of the Russian Federation" lists the grounds to refuse native or foreign applicants to research. The grounds can be classified by different criteria.

By the danger posed to the world the research is not allowed if it threatens the national defence and foments war.

By the danger to the protection of the environment the research must not be undertaken if it is incompatible with the rules of environment protection, if it is of a direct significance to the regional geological examination, the exploration and the exploitation of the mineral resources of the continental shelf. The

[14]No 187 of 30 November, 1995

[15]No 633 of 29 August, 2001.

research must not be authorised if it includes the creation, the exploitation and the use of artificial islands, installations, facilities, drillings, explosives and pneumatic units on the continental shelf.

The third basis for withholding the coastal state`s consent is the threat to the sovereign rights and the jurisdiction of the coastal state for the purpose of the exploring and the exploiting, the conserving and the managing of the natural resources on the continental shelf. If some areas are already declared by the Government to be explored by the national resources, no other entity can replace them. Likewise, the consent to the research must be withheld when a native or a foreign applicant is bound to fulfil obligations to the Russian Federation arising out previous marine scientific researches. Finally, the fourth ground to refuse to research can be qualified as being contradictory to the factual information: for example, when the applicant provides unreliable or inadequate information about its activities.

What research on the continental shelf beyond 200 nautical miles is concerned, Russian bodies cannot withhold the consent to research on the abovementioned grounds except for the regions where the Government announced an intent to explore the continental shelf and investigate its mineral resources and water bio resources. The information of such regions shall be placed in the "Notice to mariners".

The Regime of the Exploitation of the Natural Resources of the Continental Shelf Beyond 200 Nautical Miles from the Baselines from which the Breath of the Territorial Sea is Measured under the 1982 UN Convention on the Law of the Sea; The Example of the Russian Federation on the Extension of its Continental Shelf

At the present time a coastal state can enjoy various regimes of the exploitation of natural resources in its water partitions. The Convention distinguishes them according to the status of the water area: the territorial sea, the exclusive economic zone, the continental shelf, the continental shelf beyond 200 nautical miles from the baselines from which the breath of the territorial sea is measured.

Before focusing on the last, we suggest we briefly describe all of the aforementioned and distinguish the difference in the regimes of the exploration and the exploitation of mineral resources. The regime of the territorial sea implies that the coastal state extends its sovereignty on the adjacent belt of the sea as well as to its bed and subsoil under Art. 2 of the UNCLOS. Consequently, only the coastal state is empowered to explore and to exploit its mineral resources.

The regime of the exclusive economic zone means that the coastal state has sovereign rights for the purpose of the exploring and the exploiting, the conserving and the managing of the natural resources, whether living or non-living, of the waters superjacent the seabed and of the seabed and its subsoil according to Art. 56 of the UNCLOS. In exercising of its rights and performing of its duties the coastal state shall have due regard for the rights and duties of

other states and shall act in the manner compatible with the provisions of the Convention. The rights and the duties of other states in the exclusive economic zone are listed in Art. 58 of the Convention. Unfortunately, none of them is connected to the exploitation of the mineral resources. Although two of them could be vicariously linked to the business – the laying and the operation of submarine cables and pipelines.

The third status of the sea is the continental shelf. The regime of the continental shelf provides the coastal state with the exercising of its sovereign rights for the purpose of the exploring and exploiting of its natural resources. Art. 77 of the Convention states that these rights "are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state"[16]. It is important to note that the sovereign rights of the coastal state do not depend on the effective or notional occupation of the area by the coastal state. Neither do they depend on any express proclamation of the coastal state.

The regime of the exploitation of the continental shelf beyond 200 nautical miles is finally the one we would like to specify on. The Convention allows the coastal state to explore and to exploit the mineral resources on this "territory" provided it makes payments or contributions to other states according to Art. 82 of the UNCLOS. Part 2 of this Article provides for the calculative details of the contribution. The contribution shall be made annually with respect to all of the production at a site after the first five years of the production. For the sixth year, the rate of payment shall be 1 per cent of the value or volume of the production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. There is only one exemption from this rule, set down in Par. 3 of Art. 82 of the UNCLOS: a developing state which is the importer of the mineral resource produced on its continental shelf shall be exempt from making payments or contributions in respect of that mineral resource.

One might ask whether it is possible for a non-coastal state, a legal entity or a specified international organisation to explore the continental shelf beyond 200 nautical miles and exploit its mineral resources. Since the UNCLOS and the documents of the Commission on the Limits of the Continental Shelf do not name entities other than coastal states, we come to the conclusion that only the coastal states - Parties to the Convention - can explore the continental shelf beyond 200 nautical miles and exploit its mineral resources. Likewise, the Rules of Procedure of the Commission on the Limits of the Continental Shelf[17] refer to the coastal states as the sole possible addressees.

Interesting enough is that the international law permits a coastal state to establish the outer limits of its continental shelf beyond 200 nautical miles and exercise sovereign rights over the natural resources there. The UNCLOS prescribes the extension of the continental shelf as well. In accordance to Art. 4 of "Annex II. The Commission on the limits of the continental shelf" to the

[16]Paragraph 2 of Art. 77 of the UNCLOS
[17]CLCS/40/Rev.1

Convention, a coastal state shall submit particulars of the limits to the Commission alongside with the supporting scientific and technical data within 10 years of the entry of the Convention into force for that state.

The coastal state is also obliged to follow the Rules of the Procedure of the Commission on the Limits of the Continental Shelf[18] adopted in the twenty first session of the Commission on the limits of the Continental Shelf on 17th March - 18th April, 2008. The Rules set up the – procedure for extending the outer limits of the continental shelf[19]. Firstly, the coastal state shall express the intent to set new limits[20]. The Commission shall verify whether the mainland shore limit extends to more than to 200 nautical miles, make a preliminary examination of the submission and clarifications[21].

After the notification of the receipt of a submission and the publication of the proposed outer limits of the continental shelf related to the submission[22] the Commission makes a recommendation, which the coastal state can either accept or decline[23]. In case of acceptance, the state fixes the final limits. If the state does not agree with the Commission`s recommendations, the state shall draw a new statement[24]. The final step of this procedure takes place when the coastal state delivers the map of the limits to the International Seabed Authority[25].

Having kept the term of 10 years after the Convention came into force for the Russian Federation, the RF Government made a joint submission to the Commission on the limits of the continental shelf to extend the limits of the continental shelf of the Sea of Okhotsk and of the Arctic Ocean beyond 200 nautical miles in 2001. For the purposes of convenience, it was decided to divide the submission into two.

On 11th March, 2014 the Commission gave positive recommendations to the Russian authorities to set the outer limits of the continental shelf beyond 200 nautical miles in the Sea of Okhotsk. The Decree "About the continental shelf of the Russian Federation in the Okhotsk Sea"[26] declared that the sea bed and the subsoil (enclave) beyond 200 nautical miles situated in the central part of the Okhotsk sea and limited such that its borders are the borders of the exclusive economic zone of the Russian Federation in the Okhotsk sea shall be affirmed to be the continental shelf of the Russian Federation. It is also stated in the Decree that the boundaries of the continental shelf in the Okhotsk Sea are final and mandatory for other states according to Par. 8 of Art. 76 of the UNCLOS.

[18]Hereinafter "Rule" or "Rules".
[19]The full procedure of submission is described in Part XI "Submission by a coastal State" (Rules 45 – 54) of the Rules of the Procedure of the Commission on the Limits of the Continental Shelf.
[20]Rule 45.
[21]Rule 49.
[22]Rule 50.
[23]Rule 53.
[24]Par. 4 of Rule 53.
[25]Rule 54.
[26]No 845 of 15 August, 2015

Conclusion

The conducting of marine researches is not often discussed in the scientific literature, since the theme is of a technically descriptive nature and contains little argumentative information. The conducting of a marine research is slightly indicated in the legal documents too, because there are exceptionally few issues of strategic importance here, except when tackling the exclusive economic zone and the continental shelf. Contrarily, mineral resources exploitation is by far the most often discussed topic in the international maritime law. One has already distinguished the third area of investigation: the territory of the continental shelf beyond 200 nautical miles that has been considered from the two perspectives of the article. The author hopes that such construction of the paper makes it unique in the accumulation of the information on the issues of the strategic importance in the specified areas of the international maritime law.

The regulation of the performance of marine scientific researches in general is fully provided for by the "Constitution for the Oceans"[27] and the Russian legislation. Art. 246 of the Convention sets forth the right of non-coastal states and organisations to request to research in the exclusive economic zone and on the continental shelf of the coastal state. Par. 5 of this Article contains the legal grounds to withhold the coastal state`s consent, that, being elaborated by the Russian law or any other coastal state`s legislation, can be classified as being harmful to the community`s wellbeing, to the protection of the environment, to the coastal state`s sovereignty and containing factual mistakes.

In comparison to the international law, the national legislation is more detailed in terms of the request for the research, expanding the scope of activities, mentioned in Art. 246 of the UNCLOS. In Russia the main acts regulating this activity are the Rules to conduct a marine scientific research in the internal waters, the territorial sea, the exclusive economic zone and on the continental shelf of the Russian Federation, confirmed by the Ruling of the Government of the Russian Federation No 391 of 30 July, 2004 and the Federal Law "About the Continental Shelf of the Russian Federation" No 187 of 30 November, 1995. The Rules list actions that are "of a direct significance for the exploration and the exploitation of natural resources"[28] – the threat that the coastal state shall not allow when giving a license for marine scientific researches. The Federal law "About the Continental Shelf of the Russian Federation" lists the requirements for a state to receive a license to research on the continental shelf and names the cases when it can be rejected. Thus, the Convention sets up short and basic norms for coastal and non-coastal states in the marine scientific research activity. It provides the "gold standard" for the domestic law of a coastal state, according to which its federal services will permit or reject performing researches in the water areas under the sovereignty of their state. The wording "activities of a direct significance for the exploration and the exploitation", which has been considered in the article, is one of the examples of such norms.

[27]Koh (1982).
[28]Par. 5(a) of Art. 246 of the UNCLOS.

A general conclusion on scientific research may sound like this: any state or an international organisation can conduct researches in all kinds of water spaces under the jurisdiction of the coastal state with the permission of the latter. Such permission is not needed for the researches on the continental shelf beyond 200 nautical miles, where coastal states don`t exercise their jurisdiction according to Par. 6 of Art. 246 of the UNCLOS. There is only one exception from this rule: when a coastal state has publicly designated some areas on the continental shelf beyond 200 nautical miles under the exploitation or detailed exploratory operations and reported about it to the community within a reasonable period of time.

The opposite conclusion shall be made when considering the continental shelf beyond 200 nautical miles from the angle of its exploration: only the coastal state can explore this “territory” and exploit its natural resources. When doing so, it must make payments to the specially appointed body according to Art. 82 of the UNCLOS. This body will distribute the payments among other states on the principle of justice and with the due regard of the interests and needs of the developing states, particularly the least developed and the land-locked. A developing coastal state that is the importer of the resources excavated from its continental shelf is exempt from this duty. A coastal state can enjoy its jurisdiction over the territory beyond 200 nautical miles if it succeeds in extending its continental shelf with the Commission on the limits of the continental shelf.

We have also ascertained that the UNCLOS does not contain the provisions for the exploitation of the natural resources on the continental shelf beyond 200 nautical miles by the non-coastal states, professional legal entities or specified international organisations. That is why we have determined that, firstly, only a coastal state and, secondly, only a Party to the Convention, are allowed to exploit the mineral resources on the discussed marine area.

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International Convention

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